(2014) 08 PAT CK 0076

In the Patna High Court

Case No : Cr. WJC No. 487 of 2014

Aasif P.K. APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 04-08-2014

Acts Referred:

Constitution of India, 1950 — Article 136, 21, 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 125, 154, 156, 156(3), 167
Defence of India Act, 1971 — Section 12(2), 3
Delhi Municipal Corporation Act, 1957 — Section 467, 469, 471
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 36(a)(b), 37, 37(2)
National Investigation Agency Act, 2008 — Section 10, 11, 11(1), 13, 14
Penal Code, 1860 (IPC) — Section 120-B, 161, 162, 163, 164
Prevention of Corruption Act, 1988 — Section 3, 5, 5(3)
Prevention of Food Adulteration Act, 1954 — Section 12, 20, 20(1)
Prevention of Terrorism Act, 2002 — Section 34, 34(1), 34(4)
Special Courts Act, 1979 — Section 11(1)
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 12(1), 14(1), 14(3), 17, 17(5)
Unlawful Activities (Prevention) Act, 1967 — Section 17, 18, 18(B), 2, 21

Citation : (2015) 1 PLJR 1017

Hon'ble Judges : I.A. Ansari, J;Anjana Mishra, J

Bench : Division Bench

Advocate : Praveen Kumar, Rakesh Kumar, Dhananjay Kumar Singh, Jyoti Ranjan Jha and Prakriti Sharma, Advocates for the Appellant; Devendra Kumar Sinha, Pramod Kumar Sinha and Alok Kumar Rahi, Advocates for the Respondent

Judgement

I.A. Ansari, J.—The methods adopted in organized crimes, involving participation of several persons, known and unknown, highly motivated to act under a well crafted plan, has been necessitating newer laws to give the Security Agencies a vantage point. National Investigating Agency Act, 2008, is one such law, which has brought into fore a new investigating agency and a new forum for trial of those cases, which have been designated as scheduled offences under the National Investigating Agency Act, 2008. The National Investigation Agency Act, 2008, has thrown open various questions of immense legal importance. Since judicial powers of a Court have to have well defined contours within which the powers, vested in various levels of judiciary, has to be exercised, the present case is one of such cases, where issue, pertaining to jurisdiction of ordinary Criminal Courts, has become a subject-matter of analysis.

2. In view of the arguments and counter arguments, made in this case, coupled with the relevant statutory provisions, the issues, arising for determination in the present writ petition, may be summarized as follows;

(i) Whether ordinary Police force of a State can investigate a scheduled offence? What would be the role and power of State Agencies investigating a scheduled offence?

(ii) What are the courses open to an ordinary Criminal Court, when an accused, charged with scheduled offences under the NIA Act, is produced before it?

(iii) Whether the charge sheet, investigated by State Police force into a case, can be laid before Chief Judicial Magistrate as in the case of general offences?

(iv) Whether committal proceedings would be necessary in a case, which involves commission of scheduled offence?

3. The above are some of the important issues, which have arisen for determination in the present case.

4. With the help of this application, made under Articles 226 and 227 of the Constitution of India the petitioner, who is an accused in Lakhisarai (Kabaiya) Police Station Case No. 454 of 2013, has put to challenge, inter alia, the order, dated 22.5.2014, whereby the learned Chief Judicial Magistrate, Lakhisarai, has taken cognizance of offences punishable under Sections 420, 467, 468, 471 and Section 120-B of the Indian Penal Code against the accused persons, namely, (i) Gopal Kumar Goyal, (ii) Pawan Kumar, (iii) Vikash Kumar, (iv) Ganesh Prasad, (v) Ayesha Bano, (vi) Jubair Husain, (vii) S.M. Mustaq Ahmad, and (viii) Md. Arif @ Asif (i.e., the petitioner herein), and while deferring the question of taking of cognizance of offences punishable under Sections 17, 18, 18(B), 21, 38 and 40 of the Unlawful Activities (Prevention) Act, 1967, for want of requisite sanction, transferred the case to the Court of the learned Additional Chief Judicial Magistrate, Lakhisarai, for disposal.

5. We have heard Mr. Praveen Kumar, learned Counsel for the petitioner, and Mr. Devendra Kumar Sinha, learned Additional Advocate General No. 2, appearing on behalf of the respondents.

BACKGROUND FACTS

6. The material facts and various stages, which have given rise to the present writ petition, may, in brief, be set out as under:

(i) On 7.11.2013, at 08:30 PM, First Information Report was lodged, at Lakhisarai (Kabaiya) Police Station, by its S.H.O., Santosh Kumar Singh, alleging, briefly stated, thus:

(a) The informant, on 7.11.13, at 10 A.M., proceeded from the police station by jeep, along with other police personnel, to watch miscreants. Then, an informer gave him a confidential information that some members of a gang, who used to provide financial help to the terrorists by way of cheating and forgery, were present, in two vehicles, near the ATM of HDFC Bank and were on look out for either withdrawing or depositing money in the Bank. The informer also stated that these people used ATM cards in the name of other people or the accounts opened in fake names for transaction of money and they used to talk to persons residing in different cities of India and even in Pakistan and used to obey their orders. Their local leaders were Mohammad S.M. Faizan and Dawood but S.M. Faizan had died some days ago in an accident and his accomplice, Dawood, was, therefore, actively operating the gang. If the raid is conducted immediately, unearthing of a large network, which supplies money to terrorists, would be possible.

(b) Since the information concerned the national interest and was most sensitive, the informant, immediately, informed the Superintendent of Police and other senior officers, on wireless, about the information so received and obtained direction and, then, apprised S.I. Shambhu Sharan Singh, S.H.O. of Lakhisarai Police Station, of the said information. The informant requested the S.H.O. to reach the ATM of HDFC Bank for co-operation and, then, the informant, along with other officers, reached Chaiti Durgasthan near Bazar Samiti at 10:45 A.M. and found a white coloured Scorpio vehicle having no number plate. In the meantime, Shambhu Sharan Singh, S.I. of Police, also reached there with police force. On seeing the police force coming towards them, three to four persons, who were in the vehicle, tried to run away, but they were nabbed. The informant, then, searched the apprehended persons, one by one, following the rule of search in the presence of two independent witnesses, namely, (1) Sunil Thakur and (2) Shivanand Pandit. All the four apprehended persons stated their names as (1) Gopal Kumar Goyal, (2) Pawan Kumar, (3) Vikash Kumar, (4) Ganesh Prasad, and, in course of their search, the informant found one Samsung set (mobile) C.E.O.-168 with SIM card No. 8271494102 and 8862935473, one Samsung set (mobile) C.E.O.-168, Model No. G.T.E. 1282T with SIM card No. 7766088088 and 7766088099, one purse containing Rs. 5,000/-, ATM card bearing No. 4363030207033606 of HDFC Bank, ATM card bearing No. 4693750830027292 of ICICI Bank, ATM card No. 5576644694012335 of Union Bank, ATM card nos.-5044370049415106 and 5044370049410651 of Central Bank, ATM card Nos. 5122652015028000l and 5026520200873227 of Punjab National Bank, with deposit slip of Ashok Kumar Gupta, bearing Account No. 1497101018241, dated 13.8.2013 deposit slip of Rs. 25,000/- on 24.8.13, Rs. 25,000/- on 12.8.13 and deposit slip of Rs. 31,000/- of Federal Bank, dated 29.8.13, in the name of Ashok Kumar Gupta, deposit slip of Rs. 20,000/- dated 5.11.13 of Union Bank, Voter ID card and driving license of Ashok Kumar Goyal.

(c) One set of Samsung mobile of white colour, bearing SIM No. 9852290766, one set of Samsung mobile of Black colour, bearing SIM No. 9852381988 and ATM card bearing No. 6070930015139017 of Punjab National Bank, ATM bearing No. 4693750830027276 of ICICI Bank, ATM bearing No. 5196200066885699 of State Bank of India, ATM bearing Nos. 6070930031027469 and 6070930015138290 of the Punjab National Bank, and deposit slip dated 13.8.2013 of Rs. 49,000/-, in the name of Ashok Kumar Gupta, having Account No. 162401001180, Rs. 30,000/- deposited in Account No. 1624010031180 of the Federal Bank, Rs. 30,000/- of Suraj Kumar Vishwakarma, deposited in Account No. 16240100023328 of the Union Bank Rs. 20,000/- of Rahul Kumar deposited in Account No. 6245020100000382 Rs. 20,000/- of Rahul Kumar, Rs. 49,000/- of Ganesh Kumar, deposited in Account No. 23500110026618 and Rs. 6,500/- in cash, were recovered from the possession of Pawan Kumar.

(d) A set of Samsung mobile of Black colour bearing SIM Nos. 9852566181 and 8804637382 and ATM card Nos. 60730015138415 and 6070930031025869 of Punjab National Bank and ATM card No. 4693750196029148 of ICICI Bank, and ATM card Nos. 8196200022355258, 8196190055160321 and 62201800923400016344 of State Bank of India, ATM No. 4029850308620084 of the Bank of Baroda and Passbook of Account No. 0986101023256 of the Canara Bank, Account No. 032140816339 of SBI and deposited slip of Rs. 25,000/- in the Account No. 0986101022297 in the name of Manoj Yadav, a deposit slip, dated 15.6.2013, bearing amount 32,000/- in the name of Ganesh Kumar Gupta, with the Federal Bank, were recovered from the possession of Vikash Kumar.

(e) A set of Samsung mobile of White colour bearing SIM No. 9097165715, a Black purse containing ATM card bearing No. 5264951730590548, Rs. 25,000/- deposited in the name of Baby Devi, in Account No. 18562191904780 of the Oriental Bank of Commerce, Rs. 25,000/- deposited in the name of Rajeev Kumar, in Account No. 18562191004827, a deposit slip of Rs. 25,000/- in the name of Shankar Kumar of Account No. 18562191004810, Rs. 25,000/- deposited in the name of Pankaj Kumar in Account No. 18562191003523, vide deposit slip dated 26.8.2013, a deposit slip of Rs. 25,000/- and Rs. 45,000/- in cash, without showing any account number belonging to Oriental Bank of Commerce, blank signed cheque of ICICI Bank, bearing Nos. 079274(2), 079271(3), 079273(4), 079273 of Account No. 0109605500354 in the name of Rajeev Kumar were recovered.

(f) A White Scorpio vehicle without having any registration number, but having the chassis number as MAIA2MHNC2M61445, Engine number MHC4M40517, the venire contained sale certificate and service coupon of the Sonali Auto Limited in the Dashboard and blank cheque leaves, bearing No. 86911 to 086920 of the ICICI Bank of Account No. 019601534609, issued in the name of Gopal Kumar Goyai, blank cheque leaves bearing No. 000005 to 000050 of the Bank of Baroda, belonging to Account No. 46670200000004, issued in the name of Uday Kumar Sao, and deposit slip, dated 1.6.13, showing deposit of Rs. 50,000/- in

SBI Account No. 318684711745, deposit slip showing deposit of Rs. 49,000/- in the name of Suraj Kumar Vishwakarma, in Account No. 16210100233328 of the Federal Bank, Rs. 49,000/- deposited in the name of Raju Kumar in Account No. 019601534352 of the Union Bank, Rs. 35,000/- deposited in Account No. 5010000047575042 of HDFC, Rs. 4,000/- deposited in Account No. 417602010203404 of the Union Bank of India, the amount deposited by Rajesh Gupta in Account No. 469402010881684, Rs. 25,000/- deposited by Gopal Kumar Goyal in Account No. 624502010004050 of the Union Bank of India, Rs. 25,000/- deposited by Ashok Kumar Gupta in Account No. 019601534352 of ICICI a deposit slip bearing Rs. 35,000/- in the name of Raju Kumar, in Account No. 019601534352 of ICICI, a deposit slip showing deposit of Rs. 1,10,000/- in the name of Goyal Kumar in Account No. 50100000382 of HDFC, Rs. 25,000/- deposited in Account No. 624502010000382, of Union Bank of India and the said amount has been deposited in the name of Rahul Kumar, Amount Rs. 25,000/- deposited in the name of Kumari Nagmani in Account No. 62450201000898, Rs. 25,000/- deposited in the name of Pankaj Kumar in Account No. 624502010004059 of the Union Bank of India, Rs. 25,000/- deposited in the name of Gopal Kumar Goyal in Account No. 624502010002937 of the Union Bank of India and Rs. 25,000/- deposited in the name of Rajesh Kumar Gupta in Account No. 469402010881684 and a blank unsigned cheque of Account No. 0986101023256, bearing name of Vinod Singh were recovered.

(ii) The seizure list was, according to the informant, duly prepared and then it was seized. Both independent witnesses put their signatures on the seizure list voluntarily. On being enquired separately about the ATMs and documents of various natures, different phone numbers saved in their mobile phones and unsigned blank cheque leaves, the apprehended persons did not give any satisfactory reply. Their presence in such condition and the articles recovered from their possession corroborated the information given by the informer.

(iii) Based on the First Information Report aforementioned, so lodged, Lakhisarai (Kabaiya) Police Station Case No. 454 of 2013, came to be registered under Sections 420, 467, 468, 471 and Section 120-B of the Indian Penal Code read with Sections 17, 18, 18(B), 21, 38 and 40 of Unlawful Activities (Prevention) Act, 1967, against (i) Gopal Kumar Goyal, (ii) Pawan Kumar, (iii) Vikash Kumar, (iv) Ganesh Prasad, (v) Daud Ansari, (vi) Ayesha Bano, (vii) Ibrahim, (viii) Khan, (ix) Maulvi Saheb, (x) Bittu, and (xi) Pappu, and others.

(iv) During the course of investigation of the case, a search warrant was issued, on 22.11.2013, by the learned Chief Judicial Magistrate, Lakhisarai, authorizing, inter alia, the Investigating Officer to search the house of the present petitioner for some important documents, such as, A.T.M. Cards, bank pass books and bank account numbers. A search was accordingly conducted and the petitioner came to be arrested, at Mangalore (Karnataka), on 22.11.2013 and, on 27.11.2013, he was produced before the learned Chief Judicial Magistrate, Lakhisarai, and was remanded to custody.

(v) Upon investigation, charge sheet, i.e. police report under Section 173(2)(i) of the Code of Criminal Procedure, was submitted, under Sections 420, 467, 468, 471 and Section 120-B of the Indian Penal Code read with Sections 17, 18, 18(B), 21, 38 and 40 of Unlawful Activities (Prevention) Act, 1967, against the present petitioner and some other accused. On 5.2.2014, the charge sheet was placed before the learned Chief Judicial Magistrate, Lakhisarai, and the learned Chief Judicial Magistrate, Lakhisarai, having seen the charge sheet, signed the same, but did not take cognizance for want of sanction for prosecution of offences under the Unlawful Activities (Prevention) Act, 1967.

(vi) After several orders of remand, cognizance of offences under Sections 420, 467, 468, 471 and Section 120-B of the Indian Penal Code was, eventually, taken, on 22.5.2014, by the learned Chief Judicial Magistrate, Lakhisarai, but no cognizance was taken of the scheduled offences under the Unlawful Activities (Prevention) Act, 1967, because of want of sanction and, thereafter, the case was, as mentioned above, transferred to the learned Additional Chief Judicial Magistrate, Lakhisarai, for disposal.

(vii) Aggrieved by the act of taking cognizance of the offences aforementioned and the remand of the accused-petitioner to judicial custody, the petitioner has filed the present writ petition, as indicated above, seeking, inter alia, issuance of a writ, in the nature of Habeas Corpus, commanding the respondents to produce the petitioner and requiring them to release the petitioner.

7. Before, however, the present writ petition was filed, an application was made by the petitioner seeking bail in the case aforementioned, but the same was turned down by the learned Chief Judicial Magistrate, Lakhisarai, and the petitioner, then, came to this Court with an application made under Section 439 of the Code of Criminal Procedure seeking bail, but the same was also rejected and it is, thereafter, that the present writ petition has been made putting to challenge the very act of taking of cognizance of the offences mentioned hereinbefore and also the act of remanding the accused-petitioner to judicial custody in the manner as indicated above.

GROUNDS OF CHALLENGE

8. The primary ground of challenge to the order, dated 22.5.2014, taking cognizance in the manner, as indicated hereinbefore, is, inter alia, that the State Police, having investigated the case, ought to have submitted charge sheet, i.e. the police report, under Section 173(2)(i) of the Code of Criminal Procedure, 1973, in the Special Court, which has been constituted by the Central Government under Gazette notification, as contained in S.O. 2158(E), dated 1st September, 2010, in exercise of its powers under Section 11(1) of the National Investigation Agency Act, 2008, for trial of scheduled offences, the territorial jurisdiction of the Special Court aforementioned having been extended throughout the State of Bihar.

9. Before proceeding further, it may be pointed that the petitioner, initially, came

to this Court on the ground that without taking cognizance for want of sanction of the scheduled offences under the Unlawful Activities (Prevention) Act, 1967, no order of remand, in the light of the provisions of Section 309 of the Code of Criminal Procedure, could have been legally taken. However, as the cognizance of offences under the Indian Penal Code have been taken without, of course, taking cognizance of any of the scheduled offences under the Unlawful Activities (Prevention) Act, 1967, for want of sanction, the petitioner has put to challenge, as already indicated above, the order taking cognizance of the offences under the Indian Penal Code and further remand of the petitioner into judicial custody.

10. In the beginning, though it was submitted, on behalf of the petitioner, that a scheduled offence, under the Unlawful Activities (Prevention) Act, 1967, cannot be investigated by any investigating agency other than the National Investigating Agency, constituted under the National Investigation Agency Act, 2008, and the production or trial shall take place in the Special Court, which may be constituted by the Central Government in exercise of powers under Section 11(1) of the National Investigation Agency Act, 2008, this submission has been given up inasmuch as it has been acceded, on behalf of the petitioner, that the State Police may, in a given case, investigate a case involving scheduled offences under the Unlawful Activities (Prevention) Act, 1967.

11. It had been further contended, at the initial stage, that having investigated the case and having allegedly found that schedules offences under the penal provisions of Unlawful Activities (Prevention) Act, 1967, had been committed, the charge sheet, in the present case, ought to have been submitted, in the Special Court, which stands constituted by the Central Government by Gazette Notification, as contained in S.O. 2158 (E), dated 1st September, 2010, in exercise of its powers under Section 11(1) of the National Investigation Agency Act, 2008, but this submission, too, has been changed and modified to contend before us that even if a case, under the provisions of Unlawful Activities (Prevention) Act, 1967, can be investigated, and is investigated, by the State Police, charge sheet has to be submitted in the Special Court, which may be constituted by the State Government in exercise of its powers under Section 22 of the National Investigation Agency Act, 2008, and until the time such Special Court is constituted, in the Court of Session of the Division, wherein a scheduled offence has been committed, and, thereupon, trial of such a case shall take place in the Special Court, which may have been constituted under Section 22 of the National Investigation Agency Act, 2008, and as the charge sheet, in the present case, has been submitted in the Court of the learned Chief Judicial Magistrate, Lakhisarai, who has taken cognizance of some offences under the Indian Penal Code without, of course, taking cognizance of any scheduled offence under the Unlawful Activities (Prevention) Act, 1967, the act of laying of the charge sheet, in the Court of the learned Chief Judicial Magistrate, Lakhisarai, as well as the order taking cognizance of offences by the learned Chief Judicial Magistrate, Lakhisarai, under the Indian Penal Code--when the case allegedly involved commission of scheduled offence under the Unlawful Activities (Prevention) Act,

1967-- is without jurisdiction and may be interfered with and, thereupon, such order may be passed as deemed fit.

12. In support of his contention, Mr. Praveen Kumar, learned Counsel for the petitioner, has referred to the decision, in State of Andhra Pradesh Vs. Md. Hussain @ Saleem, .

13. Controverting the submission made on behalf of the petitioner, Mr. Devendra Kumar Sinha, learned Additional Advocate General No. 2, has submitted that there is no bar to the production of an accused in the Court of the Chief Judicial Magistrate of the district concerned, when an offence is committed even if the case involves, apart from the offences under the Indian Penal Code, a scheduled offence under the Unlawful Activities (Prevention) Act, 1967, and/or making order of remand of an accused, in such a case, by the Chief Judicial Magistrate concerned and/or in laying charge sheet, in such a case, and in taking of the cognizance of offence under the Indian Penal Code by the Chief Judicial Magistrate concerned, while omitting to take cognizance of scheduled offence, under the Unlawful Activities (Prevention) Act, 1967, if sanction for such offence under the Unlawful Activities (Prevention) Act, 1967, does not exist, and/or in remanding an accused, involved in such a case, to custody. Support for these submission is sought to be derived by the learned Additional Advocate General No. 2 from the decisions in Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra and Another, , and a recent decision of this Court passed in Ahmad Ashfaque Karim Vs. The State of Bihar and Others, . (Ahmad Ashfaque Karim vs. The State of Bihar through the Vigilance, Patna and Another).

14. The learned Additional Advocate General No. 2 also contends that the State Police is competent to investigate a case under Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as ''the UAP Act''), and, upon investigation of such a case, the case has to be tried, in the light of the definition of "Court" as given by sub-section (d) of Section 2 of UAP Act, by the Court of ordinary criminal jurisdiction.

CONCEPT OF SPECIAL LAW VIS-A-VIS NIA ACT

15. Before we deal with the rival submissions made before us, it would be proper to understand the concept of Special law vis-a-vis Scheme of National Investigation Agency Act, 2008 (hereinafter referred to as ''the NIA Act'').

SPECIAL LAW:--

16. It may be pointed out, at the very outset, that while dealing with any penal provisions of any "special law'', one has to bear in mind the provisions of Sections 4 and 5 of the Code of Criminal Procedure. Sections 4 and 5 of the Code of Criminal Procedure are, therefore, reproduced hereinbelow:--

4. Trial of offences under the Indian Penal Code and other laws:

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated,

inquired into, tried; and, otherwise, dealt with according to the provisions hereinafter contained.

(2) All offences, under any other law, shall be investigated, inquired into, tried, and, otherwise, dealt with according to the same provisions, but subject to any enactment, for the time being in force, regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. Saving.--Nothing contained in this Code shall in the absence of a specific provision to the contrary, affect any special or local law any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

17. A careful reading of Section 4 of the Code of Criminal Procedure shows that this Section stands divided into two parts. While Sub-section (1) of Section 4 of the Code of Criminal Procedure lays down that all offences, under the Indian Penal Code, shall be investigated, inquired into, tried, and, otherwise, dealt with according to the provisions contained in the Code of Criminal Procedure; whereas Sub-section (2) of Section 4 of the Code of Criminal Procedure makes it clear that all offences, under any "other" law, shall be investigated, inquired into, tried, and, otherwise, dealt with according to the same provisions, i.e., the provisions contained in the Code of Criminal Procedure, subject to any enactment (for the time being in force) ''regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences''.

18. Coupled with the above, what becomes clear is that to the extent a "special law" modifies the procedure for investigation, enquiry, trial or dealing, otherwise, with offences created under the "special law", it is the modified procedure, which would be applicable. In effect, therefore, to the extent that a "special law" intrudes into the field delineated by the Code of Criminal Procedure for investigation, enquiry or trial, the provisions, contained in the Code, with regard to investigation, enquiry, trial or, otherwise, dealing with offences, would recede. Consequently, an offence, punishable by a "special law", would be investigated, enquired into, tried or, otherwise, dealt with according to the "special law" even when the "special law" does not create a Special Court and allows the ordinary criminal Court to exercise jurisdiction in respect of such offences.

19. A combined reading of sub-sections (1) and (2) of Section 4 of the Code of Criminal Procedure further makes it clear that as far as offences, under the Indian Penal Code, are concerned, these offences will be investigated, inquired into, tried, and, otherwise, dealt with, according to the provisions contained in the Code of Criminal Procedure and that even the offences under any "other" law, (which obviously mean "special law" or "local law") shall be investigated, inquired into, tried, and, otherwise, dealt with, in accordance with the provisions of the Code of Criminal Procedure as may be applicable to offences subject to, however, any deviation, which the "special law" or local law may, otherwise, make as regards the manner or place of investigation, enquiry, trial or the

manner in which a case shall, otherwise, be dealt with.

20. The expression, ''otherwise be dealt with'', appearing in sub-sections (1) and (2) of Section 4 of the Code of Criminal Procedure, has very wide effect and envisages all the steps, which may be required to be taken for the purpose of effective investigation, enquiry or trial. The expression ''otherwise dealt with'' would, therefore, include obtaining of remand--judicial or police--in terms of Section 167(2) of the Code of Criminal Procedure. To put it a little differently, the provisions of the Code of Criminal Procedure will be applicable, as regard investigation, enquiry or trial, not only as far as the offences, under the Indian Penal Code, are concerned, but also in respect of offences under any "other" law, (i.e., special or local) except to the extent as the "other law" may modify.

21. As a corollary, what becomes clear is that unless the "other" law, whereunder any investigating agency and/or any Court is created or special mechanism or procedure for investigation, enquiry or trial is provided, an ordinary criminal Court, which falls under the class of criminal Courts, as envisaged by Section 6 of the Code of Criminal Procedure, will continue to exercise such powers, which may be available to it under the Code of Criminal Procedure. This becomes clearer if one bears in mind the fact that there are two schedules appended to the Code of Criminal Procedure. So far as the first schedule is concerned, it stands divided, depending upon the classification of offences, into two parts. While the first part of the first schedule deals with the offences of the Indian Penal Code and lays down, in respect of each offence, (which the Indian Penal Code creates), as to which Court would be competent to try such an offence, the second part of the first schedule deals with offences against "other" laws. Part-II of the first schedule reads as under:--

22. A careful reading of the first schedule shows, as already indicated above, that in respect of each offence, punishable under the Indian Penal Code, the Court, by whom the offence is triable, has been prescribed. This apart, as to whether the offence is bailable or non-bailable, cognizable or non-cognizable has also been prescribed; whereas, in respect of offences, against the "other" laws (i.e. special or local), the question as to whether an offence is cognizable or non-cognizable, bailable or non-bailable, triable by one Court or the other, is dependant on the period of imprisonment as may have been prescribed in respect of an offence. As a result thereof, while an offence, punishable by imprisonment of less than 3 years, or with fine only, is cognizable, bailable and triable by any Magistrate, an offence, which is punishable by imprisonment for more than three years, but less than 7 years, is non-cognizable, non-bailable and triable by not every Magistrate, but by a Magistrate of the First Class, which, obviously, would take, within its sweep, a Chief Judicial Magistrate, an Additional Chief Judicial Magistrate or a Sub-Divisional Judicial Magistrate. As regard the offences, which are punishable with death, imprisonment for life or imprisonment for more than 7 years, such offences are cognizable, non-bailable and triable only by a Court of Session.

23. Thus, when a "special law'' does not prescribe or provide for constitution of any Special Court for the purpose of trial of an offence under the "special law", an offence, which is punishable with death, imprisonment for life or imprisonment for more than 7 years, would be tried by a Court of Session. Consequently, in respect of offences punishable under the "special law", all the requirements, with regard to bringing of a case for trial to the Court of Session, as prescribed under the Code of Criminal Procedure, would have to be followed, which would obviously include even commitment of a case, under the ''special law'', to the Court of Session unless the ''special law'' dispenses with the provisions of commitment as contained in Section 209 of the Code of Criminal Procedure. What this will mean is that the Court of Session would not be able to try such a case, under the ''special law'', as a court of original criminal jurisdiction, unless the same is committed to it in terms of the provisions contained in Section 209 of the Code of Criminal Procedure; but when the ''special law'' provides that a Court of Session can take cognizance of a case without the case being committed to it, the Court of Session would become, in effect, a Court of original criminal jurisdiction and would not remain a Court of Session except to the extent as the ''special law'' may provide in this regard.

24. Thus, if the ''special law'' imposes any limitation on the powers of the Court, which will try an offence, then, the ordinary criminal court, which may try such an offence, have to follow, and abide by, the limitations, which might have been imposed on its powers under the ''special law'', though the Code of Criminal Procedure may not have imposed such a limitation. Similarly, if the ''special law'' confers any power on such a Court, then, the Court, which exercises the powers of the Special Court, in the absence of constitution of the Special Court, would also enjoy such powers, as may be available to the Special Court even if such powers are, otherwise, not, ordinarily, available, in the Code of Criminal Procedure, to such a Court.

25. Situated thus, it becomes clear that jurisdiction of the ordinary criminal courts, under Section 4 of the Code of Criminal Procedure, in respect of even offences under the ''special law'', is comprehensive. Consequently, so long as no other machinery is set up for trial of any particular case or class of cases under the ''special law'', jurisdiction of the ordinary criminal courts would be available depending, of course, on the period of punishment prescribed in respect of the offence(s) concerned except to the extent as the ''special law'' may, as regards the manner of dealing with such a case, otherwise, prescribe.

26. What may also be noted is that exclusion of jurisdiction of a Court of an ordinary criminal jurisdiction can be brought about only by making provisions for setting up of a Court of limited jurisdiction. Hence, where no Special Court is contemplated under a ''special law'', it is the ordinary criminal court, which will exercise jurisdiction in respect of the offence against "other" laws (i.e., ''special law). The exercise of such jurisdiction would, of course, stand modified to the extent as the ''special law'' may indicate.

27. If, however, a Special Court is contemplated, but not constituted and the special enactment envisages that during the transitory period, the ordinary criminal court, which may have, otherwise, jurisdiction in respect of an offence (depending upon the punishment prescribed), would exercise the jurisdiction; but the exercise of jurisdiction by the ordinary criminal court would, in such a case, be controlled by such limitations as the special enactment may envisage in respect of the Special Court. In short, the law and procedure, for trial of cases under the Indian Penal Code and those, under special Statutes, cannot differ except to the extent as the ''other'' law, (i.e., special or local law) prescribes.

28. Consequently, if a ''special law'' provides for trial of a class of offences by Court of Session and make such Court of Session a Court of original jurisdiction empowering it to take cognizance of an offence on the basis of a "complaint" as defined in Section 2(d) of the Code of Criminal Procedure and/or on the basis of "police report" as contemplated under the provisions of Section 173(2) of the Code of Criminal Procedure, the Court of Session will be empowered as well as bound to take cognizance of such offence without the case being committed to it as is, ordinarily, done by a Judicial Magistrate.

29. In short, and if we may reiterate, even the Court of Session will try an offence, under any "other" law or "special" law, subject to such limitations as may be imposed on the power of the Court of Session or subject to such modification, in the procedure, as the "other" law, i.e. ''special law'', may provide in respect of such an offence.

30. Bearing in mind the scheme of investigation, enquiry and trial of offences under the Indian Penal Code vis-a-vis ''other'' laws (i.e., special or local) as envisaged by Sections 4 and 5 of the Code of Criminal Procedure, let us, now, turn to the decision, in Attiq-Ur-Rehman Vs. Municipal Corporation of Delhi and another, .

31. The Supreme Court, at paragraph 22, in Attiqur Rehman (supra), points out that the provisions of the Code of Criminal Procedure are applicable, where an offence, under the Indian Penal Code or any "other" law, is being investigated, enquired into, tried or otherwise dealt with, and so long as no valid machinery is set up under any "other" law for trial of any particular class of case, jurisdiction of the ordinary court cannot be said to have been excluded. While observing that exclusion of jurisdiction of a Court of general jurisdiction can be brought about only by setting up of a court of limited jurisdiction, the Supreme Court clarifies, in Attiqur Rehman (supra), that the law and procedure for trial of cases, under the Indian Penal Code or those under the "other" laws, in the light of Section 4 of the Code of Criminal Procedure, is not different except that in the case of offences, against the "other" laws, the procedure, laid down by the Code of Criminal Procedure, is subject to the provisions of the relevant enactments (for the time being in force) regulating the manner of trial of offences under that enactment.

32. The Supreme Court, in Attiqur Rehman (supra), while laying down that when a ''special law'' creates a special class of court, but when the Special Court is not constituted, the jurisdiction of the ordinary criminal court would not stand excluded, for, an offender cannot go unpunished and shall be triable by an ordinary criminal court subject, however, to the condition that the ordinary criminal court, while exercising the power of the Special Court, would follow the provisions contained in the Code of Criminal Procedure subject to such limitations and procedural modifications as may have been introduced by the special enactment.

33. In other words, subject to the modification and/or the changes in the provision of the Code of Criminal Procedure, ordinary criminal court, until the time the Special Court is constituted, shall discharge the functions of the Special Court, for, an offender cannot, when the special law has been brought into force, be allowed to go untried. In Attiqur Rehman (supra), the special enactment was the Delhi Municipal Corporation Act, 1957 (in short, ''the DMC Act''). While Section 469 of the DMC Act empowered the Government to appoint one or more Magistrate of First Class to try offences under the DMC Act, Section 467 of the DMC Act laid down that no court shall try any offence except on a complaint of, or information received from, an officer not below the rank of Deputy Commissioner appointed by the Administrator of the Corporation.

34. What is, now, important to note is that a Magistrate of the First Class, in the light of the provisions of Section 190 of the Code of Criminal Procedure, is empowered to take cognizance of an offence on the basis of (a) receipt of a complaint of facts, which constitute such offence, (b) upon a police report of such facts, and (c) upon information received from any person, other than a police officer, or (d) upon his own knowledge that such offence has been committed. However, Section 467 of the DMC Act, in Attiqur Rehman (supra), disempowered the Municipal Magistrate from trying an offence on the basis of his own information or knowledge or on the basis of a police report, as contemplated by Section 173(2) of the Code of Criminal Procedure, and confined the Magistrate''s power to try an offence, under the DMC Act, only on the basis of a complaint of, or information received from, an officer not below the rank of Deputy Commissioner appointed by the Administrator of the Corporation.

35. While dealing with the case of Attiqur Rehman (supra), the question, which arises is: whether a Judicial Magistrate of the First Class or a Metropolitan Magistrate, who had not been appointed as Municipal Magistrate under the DMC Act, was bound to follow the provisions of Section 467 of the DMC Act, and could not have, therefore, taken cognisance of offence except on the basis of complaint of, or information received from, an officer not below the rank of Deputy Commissioner appointed by the Administrator of the Corporation? The answer to this question has to be in the affirmative, namely, that apart from the fact that a Municipal Magistrate, if appointed, or a Judicial Magistrate or a Metropolitan Magistrate, so long as the Municipal Magistrate was not appointed, could have

tried an offence under the DMC Act, but could not have taken cognizance of offence, in any manner, except as the DMC Act, as a special Statute, had provided, for, while applying a special Statute, the provisions of the special Statute would prevail upon the general provisions of the Code of Criminal Procedure. Consequently, though the Magistrate of First Class could have tried an offence under the DMC Act, he could not have taken cognizance on the basis of a police report as contemplated by Section 173(2) of the Code of Criminal Procedure or on the basis of any information received from any person other than an officer as specified under the DMC Act or upon his knowledge, which he was, otherwise, entitled to do, under Section 190 of the Code of Criminal Procedure, in his capacity as a Judicial Magistrate of the First Class or Metropolitan Magistrate. Putting to rest this controversy, the Supreme Court, at paragraph 26, in Attiqur Rehman (supra), observed:--

26. A conjoint reading of the provisions of Code of Criminal Procedure and the Act, therefore, unambiguously suggests that in the absence of courts of special jurisdiction i.e. Municipal Magistrates to be appointed under Section 469 of the Act, a Judicial Magistrate of the First Class or a Metropolitan Magistrate, as the case may be, shall have the jurisdiction and powers to try the offences under the Act in accordance with the procedure envisaged by Section 467 of the Act and in accordance with the limitation (sic and) the time prescribed for initiation of the criminal proceedings under Section 471 of the Act. This interpretation is in accord with the position that every offence committed under the Indian Penal Code or under any other law for the time being in force must be tried and an accused cannot be permitted to raise any objection with regard to the forum for trial of the offence, where the specific forum has not been constituted under the Act because the law does not contemplate an offence, to go untried. Where, no court of a Municipal Magistrate has been constituted under Section 469 of the Act and no notification has also been issued conferring the powers of a Municipal Magistrate on a particular Judicial Magistrate of the First Class or a Metropolitan Magistrate, as the (sic) 44 may be, the jurisdiction of an ordinary criminal court to take cognizance of the offences committed under the Act, rules, regulations or bye-laws made thereunder is exercisable by the courts of general jurisdiction established to try offences under the Indian Penal Code as well as the offences under any other law.

36. From what has been observed and held above, in Attiqur Rehman (supra), it clearly follows that when a Special Court, as contemplated by special enactment, is not constituted, an offender cannot go unpunished if the special Statute has been brought into force. Consequently, the ordinary criminal court, depending upon the punishment prescribed, would try such an offence subject, of course, to such limitations as may have been prescribed by the special Statute itself including the deviation, if any, in the procedure, which may be envisaged in the Statute, which creates the offence.

WHO IS COMPETENT TO INVESTIGATE AN OFFENCE UNDER THE NIA ACT:

37. The NIA Act has created the National Investigation Agency, as an agency, to investigate scheduled offences, which, in terms of Section 2(g) of the NIA Act, mean the offences specified in the Schedule to the NIA Act. The Investigating Agency, which is referred to as ''Agency'', is constituted by the Central Government in exercise of its powers under Section 3 of the NIA Act. Section 4 empowers the Central Government to direct the Agency to investigate a scheduled offence and also vests in the Central Government the power of superintendence over the Agency.

38. Sub-section (3) of Section 3 of the NIA Act makes it clear that any officer of the Agency of, or above, the rank of Sub-Inspector may, subject to any orders, which the Central Government may make in this behalf, exercise, throughout India, any of the powers of the officer-in-charge of a police station in the area in which he is present for the time being and when so exercising such powers shall, subject to any such orders as aforesaid, be deemed to be an officer-in-charge of a police station discharging the functions of such an officer within the limits of his station.

39. Thus, sub-section (3) clearly shows that an officer of the Agency shall have the powers of an officer-in-charge of a police station, while discharging the functions of such an officer within the limits of his station.

40. Section 6 of the NIA Act, which relates to investigation of scheduled offences, shows that on receipt of information and, having recorded the information, in terms of Section 154 of the Code of Criminal Procedure, relating to any scheduled offence, the officer-in-charge of the police station, shall, under Section 6(1) of the NIA Act, forward a report to the State Government forthwith. The report, so received by the State Government, has to be forwarded, under Section 6(2) of the NIA Act, by the State Government to the Central Government, as expeditiously as possible. In terms of sub-section (3), read with sub-section (4) of Section 6 of the NIA Act, if the Central Government, on receipt of the report, finds it a fit case to be investigated by the Agency, it shall direct the Agency to investigate the offence. Apart from the fact that the Central Government can direct the Agency, on the basis of a report received from the State Government, to investigate a case, such direction can also be issued, in the light of Section 6(5) of the NIA Act, by the Central Government suo motu.

41. Coupled with the above, Section 8 of the NIA Act makes it clear that while investigating any scheduled offences, the Agency may also investigate any other offence, which the accused is alleged to have committed, if the offence is connected with the scheduled offence.

42. Coming to Section 10 of the NIA Act, it becomes abundantly clear that unless the National Investigating Agency, which is being referred to as the Agency, undertakes an investigation into the scheduled offence under the NIA Act, the investigating agency of the State Government shall have the power to investigate a scheduled offence and prosecute the offender.

43. Thus, both, the Agency of the Central Government as well as the investigating agency of the State Government, are competent to investigate a scheduled offence, the difference between the powers of the two investigating agencies being that when the National Investigation Agency investigates a scheduled offence, the investigating agency of a State Government cannot investigate the said scheduled offence. However, the Agency, constituted by the Central Government, is empowered to associate investigating agency of a State Government in the investigation of a scheduled offence.

44. The fall out of the above discussion is that both, the Agency of the Central Government'' as well as the investigating agency of the State Government, are competent to investigate a scheduled offence, but when the National Investigation Agency investigates a scheduled offence, the investigating agency of a State Government cannot investigate the said scheduled offence.

45. The question, which naturally arises, in the light of the above position of law, is this: Both, the Agency of the Central Government as well as the investigating agency of the State Government, are competent to investigate a scheduled offence, but when the National Investigation Agency (which is referred to as the Agency), investigates a scheduled offence, the investigating agency of a State Government cannot investigate the said scheduled offence, then, where a person, who is accused of having committed a scheduled offence, would be tried, when the National Investigation Agency investigates a scheduled offence or where such an act would be tried, when the investigating agency of a State Government investigates the scheduled offence?

ROLE OF SPECIAL COURT VIS-A-VIS POWERS OF JUDICIAL MAGISTRATE IN ORDINARY CRIMINAL CASE:

46. What is, now, important to note is that Section 2(1) of the NIA Act makes it clear that the words and expressions, which are used, but not defined in the NIA Act and defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall bear, unless the context otherwise requires, their respective meaning assigned to them in the Code of Criminal Procedure.

47. In the light of what Section 2(1) of the NIA Act states, when one turns to the Code of Criminal Procedure, it becomes clear that the expressions, "complaint" and "police report", which appear in the NIA Act, shall have the same meaning as assigned to them under Sections 2(d) and 21 Ed--sic--2(r)? of the Code of Criminal Procedure respectively. While Section 2(d) of the Code of Criminal Procedure defines "complaint" to mean any allegation, made orally, or, in writing, to a Magistrate, with a view to the Magistrate''s taking action under the Code of Criminal Procedure, that some person, whether known or unknown, has committed an offence. Section 2(d) of the Code of Criminal Procedure, however, makes it clear that a "complaint" does not include a police report. It is Section 21 Ed--sic--2(r)? of the Code of Criminal Procedure, which defines a police report'' to mean a report forwarded by a police officer to a Magistrate under sub-section

(2) of Section 173 of the Code of Criminal Procedure.

48. It may, now, be pointed out that on registering First Information Report (in short, ''FIR'') with regard to a cognizable offence, a police officer becomes entitled to investigate the case in terms of the provisions of Section 156 of the Code of Criminal Procedure and, on completion of investigation, the police officer is required to forward, under Section 173(2) of the Code of Criminal Procedure, his report of investigation to the Magistrate, who, in turn, is empowered, under Section 190(1)(b) of the Code of Criminal Procedure, to take cognizance of offence on the basis of the police report, as contemplated by Section 173(2) of the Code of Criminal Procedure.

49. It is, therefore, clear that a police report, in the Code of Criminal Procedure, is nothing but the result of investigation, which a police officer conducts. Thus, when the officer of the Central Agency or State Agency, as the case may be, investigates, in terms of Section 156 of the Code of Criminal Procedure, read in light of Section 6 of the NIA Act, a scheduled offence and, on completion of investigation, submits a report to the competent court for the purpose of taking cognizance, such a report would be nothing but a ''police report'' within the meaning of Section 21 Ed--sic--2(r)? read with Section 173(2) of the Code of Criminal Procedure.

IS A SPECIAL COURT UNDER THE NIA ACT SAME AS A COURT OF SESSION IN THE MATTER OF TAKING OF COGNIZANCE AND IN ORDERING REMAND OF AN ACCUSED TO POLICE OR JUDICIAL CUSTODY?

50. Coming to Section 11 of the NIA Act, we notice that Section 11 of the NIA Act empowers the Central Government to constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification. Even the State Government, as indicated above, has been empowered, under Section 22 of the NIA Act, to constitute Special Court(s) for the trial of offences under any or all the enactments specified in the Schedule of the NIA Act.

51. What, then, is the difference between a Special Court, which is constituted, under Section 11 of the NIA Act, by the Central Government on the one hand, and a Special Court, which is constituted, under Section 22 of the NIA Act, by a State Government?

52. In the light of Section 13 of the NIA Act, when Section 11 as well as Section 22 of the NIA Act are considered together, what becomes more than abundantly clear is that if a scheduled offence, as specified under the NIA Act, is investigated by the Agency, it is the Special Court, constituted by the Central Government, under Section 11 of the NIA Act, which would alone have the power to try the accused, who is alleged to have committed a scheduled offence, inasmuch as Section 13 of the NIA Act makes it clear that notwithstanding anything contained in the Code of Criminal Procedure, every scheduled offence, investigated by the Agency, shall be tried only by the Special Court within whose local jurisdiction

the offence was committed and, on the other hand, if the commission of the scheduled offence is investigated by an officer of the State Police, and not by the Agency, it is the Special Court, constituted, under Section 22 of the NIA Act, by the State Government, which would have the power to hold trial in respect of scheduled offences under the NIA Act.

53. When Section 11 and Section 13 of the NIA Act are pointedly considered, in the light of Section 22(3) of the NIA Act, it becomes further clear that so long as a Special Court is not constituted by the Central Government and scheduled offence is investigated by the ''Agency'', it is the Court of Session of the Division, where the scheduled offence is committed, which will be the competent Court to deal with the case during the period of investigation by the Agency of the scheduled offence and also to try the accused for commission of scheduled offence, when the investigation is completed.

54. However, when a scheduled offence is investigated by the investigating agency of a State Government, it is the Special Court, constituted under Section 22 of the NIA Act, by the State Government, which will be the competent Court to deal with such a case during the period of investigating by the State Police and also thereafter, when investigation is complete, and when no Special Court is constituted by the State Government under Section 22 of the NIA Act, then, it is the Court of Session of the Division, where such scheduled offence is committed, which will be the competent Court for the purposes aforesaid.

55. To put it a little differently, if the State Police is investigating an offence, which falls within any one of the scheduled offences under the NIA Act, then, going by the mandate of Section 22 of the NIA Act, the competent Court, with reference to such investigation, shall be the Special Court, constituted by the State Government, and where no such Special Court has been constituted, as in the case of State of Bihar, then, the Court of Session of the Division, acting as a Special Court, can take cognizance of the scheduled offence(s).

56. What emerges from the above is that when NIA Act has come into force and a Special Court has been constituted, in the State of Bihar, by the Central Government in exercise of its power under Section 11 of the NIA Act, a person, involved in the commission of a scheduled offence under the NIA Act, would be liable to be dealt with in the manner as is required to be dealt with by the Special Court, constituted by the Central Government in terms of Section 11 of the NIA Act, provided that the case, against such a person, has been investigated by the National Investigating Agency.

57. What logically follows from the above is that when the NIA Act has come into force and no Special Court has yet been constituted, as envisaged by the NIA Act, in the State of Bihar, by the Government of Bihar, an offender, in the light of Attiqur Rehman (supra) read with Section 22(3) of the NIA Act, cannot go unpunished and his case has to be dealt with in the same manner as may have been dealt with by Special Court, had the Special Court been constituted by the

State Government under Section 22 of the NIA Act.

58. It further clearly follows from the above that when the case at hand has not been investigated by the National Investigation Agency, the Special Court, which has been constituted by the Central Government in exercise of its powers under Section 11 of the NIA Act, cannot deal with the present case.

59. However, when the State Government has not constituted a Special Court in exercise of its power under Section 22 of the NIA Act, but the present case, which involves, amongst other, scheduled offence under the NIA Act, has been investigated by the police of the State of Bihar, then, (in respect of the case at hand, which allegedly involves commission of scheduled offences under the NIA Act, and is investigated by the police of the State Government) it is the Court of Session of the Division, where the scheduled offences are alleged to have been committed, which, in the light of Section 22(3) of the NIA Act, be competent to deal with the case.

60. It is important to bear in mind that Section 16 of the NIA Act embodies the procedure to be followed, while taking cognizance of offence(s) by a Special Court. Section 16 of the NIA Act is, therefore, of great relevance in the present case and is reproduced below:--

"16. (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts.

(2) Where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special Court may, notwithstanding anything contained in sub-section (1) of Section 260 or Section 262 of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and the provisions of Sections 263 to 265 of the Code shall, so far as may be, apply to such trial:

Provided that when, in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is not desirable to try it in a summary way, the Special Court shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to, and in relation to, a Special Court as they apply to and in relation to a Magistrate:

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding one year and with fine which may extend to five lakh rupees.

(3) Subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in

accordance with the procedure prescribed in the Code for the trial before a Court of Session.

(4) Subject to the other provisions of this Act, every case transferred to a Special Court under sub-section (2) of Section 13 shall be dealt with as if such case had been transferred under Section 406 of the Code to such Special Court.

(5) Notwithstanding anything contained in the Code, but subject to the provisions of Section 299 of the Code, a Special Court may, if it thinks fit and for reasons to be recorded by it, proceed with the trial in the absence of the accused or his pleader and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination."

61. On a close reading of Section 16 of the NIA Act, what becomes clear is that notwithstanding the fact that, according to Section 16(3) of the NIA Act, a Special Court, for the purpose of trial of a scheduled offence, has all the powers of a Court of Session and shall try such offence "as if it were a Court of Session", the Special Court does not become a Court of Session inasmuch as it is only the power of trial of a Court of Session that the Special Court is, by virtue of Section 16(3) of the NIA Act, entitled to exercise. In other words, the expression, "as if it were a Court of Session'', which occurs in Section 16(3) of the NIA Act, really reflects that it is only the procedure for trial of a Sessions Case, which a Special Court can follow; but it is, otherwise, not a Court of Session.

62. We may pause here to point out that Section 16(3) of the NIA Act states, "Subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session."

63. Similar provisions, as contained in Section 16(3) of the NIA Act, existed in Section 14(3) of Terrorist and Disruptive Activities Act, 1987 (popularly known as TADA). Both the provisions are, thus, pari material (sic--pari materia?).

64. The Supreme Court had the occasion to interpret Section 14(3) of the Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, . Referring to the expression "as if it were", appearing in Section 3 of the TADA, the Supreme Court pointed out, in Usmanbhai Dawoodbhai Memon (supra), that though the Parliament has vested, by using, the words "as if it were", in the Designated Court, the status of a Court of Session, yet this legal fiction, contained in Section 14(3) of the TADA, must be restricted to the procedure to be followed for trial of an offence under the TADA, i.e., trial must be in accordance with the procedure prescribed, by the Code of Criminal Procedure, in respect of a trial before a Court of Session in so far as it is applicable. The relevant observations, made in this regard, in Usmanbhai Dawoodbhai Memon (supra), at paragraph 18, read as under:--

"18. No doubt, the legislature by the use of the words "as if it were" in Section

14(3) of the Act vested a Designated Court with the status of a Court of Session. But, as contended for by learned Counsel for the State Government, the legal fiction contained therein must be restricted to the procedure to be followed for the trial of an offence under the Act i.e. such trial must be in accordance with the procedure prescribed under the Code of the trial before a Court of Session, insofar as applicable."

65. The above impression gets strengthened from the fact that Section 16(1) provides that a Special Court may take cognizance of offence without the accused being committed to it for trial, which, in turn, implies that a Special Court takes cognizance of an offence as a Court of original jurisdiction and does not have the trappings of a Court of Session, which cannot, ordinarily, take, in the light of Section 193 of the Code of Criminal Procedure, cognizance of an offence, unless the case, in terms of Section 209 of the Code of Criminal Procedure, is committed to it, for, Section 193 of the Code of Criminal Procedure states that a Court of Session cannot take cognizance of an offence as a Court of original jurisdiction except when the Code of Criminal Procedure or the special law provides otherwise.

66. Thus, a Court of Session could not have taken cognizance of an offence, under the NIA Act, without the case having been committed to it; but, as the NIA Act, provides for taking cognizance of an offence by a Court of Session, without the case being committed to it, the Court of Session can take cognizance of offence, under the NIA Act, as the Court of original jurisdiction. Such a deviation is possible even in respect of some specified offences under the Indian Penal Code. For instance, sub-section (2) of Section 199 of the Code of Criminal Procedure provides that when an offence, falling under Chapter XXI of the Indian Penal Code, is alleged to have committed against a person, who, at the time of such commission, is the President of India, Vice-President of India, Governor of a State, the Administrator of a Union Territory or a Minister of the Union or of a State or of a Union Territory, or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his functions, a Court of Session may take cognizance of such an offence, without the case being committed to it, upon a complaint, in writing, made by the Public Prosecutor.

67. Section 16 of the NIA Act also makes it clear that cognizance of an offence can be taken by a Special Court on the basis of a complaint of facts that constitute such offence or upon a police report of such facts. Thus, a Special Court can take cognizance of an offence not only. On the basis of a complaint, as defined in Section 2(d) of the Code of Criminal Procedure, but also on the basis of a police report, as defined in Section 21 Ed--sic--2(r)? of the Code of Criminal Procedure, the police report being, as indicated above, the report, which the police submits, under Section 173(2) of the Code of Criminal Procedure, on completion of investigation.

68. The question, which, now, arises for consideration is: when a Special Court

takes cognizance of an offence under the NIA Act, is it exercising its powers given to a Magistrate under Section 190 of the Code of Criminal Procedure, though it (i.e., the Special Court), in terms of Section 16(3) of the NIA Act, has all the powers of a Court of Session?

69. We have already indicated above that unlike a Court of Session, which cannot try a case, unless committed to it, under Section 209 of the Code of Criminal Procedure, by a court of competent jurisdiction, a Special Court can take cognizance of an offence without any order of commitment being issued by any Magistrate, if the Special Court receives a complaint of facts that constitute an offence, or, upon police report of such facts.

70. Since there is nothing in the NIA Act to show that a complaint has to be necessarily made by a public servant, it clearly follows that any individual can file a complaint before a Special Court. When such a complaint is filed, what is the course of action, which the Special Court can adopt? Obviously, the Special Court may take, in terms of Section 16(1) of the NIA Act, cognizance of the offence, which the complaint may disclose, and proceed to record, in terms of Section 200 of the Code of Criminal Procedure, the statements of the complainant and his witness(es), if any, present. If the Special Court feels the necessity, it may even hold, in terms of Section 202 of the Code of Criminal Procedure, an enquiry, and, on completion of such enquiry, it may either, in terms of Section 203 of the Code of Criminal Procedure, dismiss the complaint, or, in terms of Section 204 of the Code of Criminal Procedure, issue processes.

71. We may also point out that Section 190(1) of the Code of Criminal Procedure prescribes three distinct modes of taking of cognizance by a Magistrate, the modes being:--

(a) upon receiving a complaint of facts, which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

72. Coupled with the above, Section 193 read with Section 209 of the Code provides for a fourth mode of taking cognizance, namely, by way of commitment to the Court of Session.

73. Thus, Section 190 read with Sections 193 and 209 of the Code of Criminal Procedure provides, broadly speaking, four distinct modes of taking cognizance, three of the modes of taking cognizance being confined to a Magisterial Court and the fourth mode of taking cognizance being confined to the Courts of Session, namely, (i) upon receipt of a complaint of facts, which constitute such offence, (ii) upon a police report of such facts, (iii) upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed, and (iv) by way of commitment.

74. The Legislature may, in a given case, restrict taking of cognizance to one or more modes, which have been prescribed by Section 190 of the Code of Criminal Procedure.

75. No wonder, therefore, that there are several statutes, which prescribe very limited mode of taking of cognizance. For instance, under Section 20 of the Prevention of Food Adulteration Act, 1954, (in short, ''the PFA Act'') cognizance of an offence, under the PFA Act, could not have been taken except by, or with the written consent of, the Central or the State Government or a person authorized, in this behalf, by general or special order, by the Central or State Government. The only exception, in this regard, was when a prosecution was instituted, under the proviso to Section 20(1) of the PFA Act, by a purchaser or recognized consumer association if the purchaser or the recognized consumer association, as referred to in Section 12, produced, in the Court, a copy of the report of the Public Analyst along with the complaint.

76. In order to clearly appreciate that a Court of Session, while functioning as a Special Court, under the NIA Act, cannot be treated to be a Court of Session, though it (Special Court) may have the powers of the Court of Session, as far as the ''procedure for trial'' is concerned, a reference may be made to the provisions of the Prevention of Corruption Act, 1988 (in short, ''the PC Act, 1988"). Section 5 of the PC Act, 1988, lays down the procedure and powers of a Special Judge. Sub-sections (1) and (3) of Section 5 are of some relevance in the present case; hence, both these sub-sections are reproduced below:--

"5(1) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 (2 of 1974), for the trial of warrant cases by the Magistrates.

5(2) * * *

5(3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shajl be deemed to be a public prosecutor;"

77. When sub-sections (1) and (3) of Section 5 of the PC Act, 1988, are read together, what becomes clear is that Section 5 empowers a Special Judge to take cognizance of offence without the accused having been committed to it for trial and, though it shall follow the procedure prescribed by the Code for the trial of warrant cases by the Magistrates, yet the Court of the Special Judge shall be deemed to be a Court of Session.

78. Thus, though a Special Judge, appointed under the PC Act, 1988, and functioning as the Court of the Special Judge, were deemed to be a Court of

Session, it does not suffer from the limitations, which a Court of Session suffers from inasmuch as Section 193 of the Code of Criminal Procedure disallows the Court of Session from taking cognizance of offence without case having been committed to it for trial; whereas a Court of Special Judge could, under the scheme of the PC Act, 1988, take cognizance without the case being committed to it for trial.

79. In other words, the Court of Special Judge, under the PC Act, 1988, acts and functions as a Court of original jurisdiction and not as a Court of Session, though the Court of the Special Judge shall, otherwise, be deemed to be a Court of Session. This apart, the PC Act, 1988, does not empower the Special Judge from taking cognizance unless requisite sanction for such prosecution is accorded by the prescribed authorities.

80. In fact, even in respect of certain classes of offences under the Indian Penal Code, a court of original criminal jurisdiction cannot, in exercise of its powers under Section 190 of the Code of Criminal Procedure, take cognizance of certain categories of offences except upon appropriate sanction having been granted, in this regard, by the competent authority. Section 197 of the Code of Criminal Procedure furnishes one of such illustrations. Even in respect of some other offences under the. Indian Penal Code, the mode of taking of cognizance, under Section 190 of the Code of Criminal Procedure, stands restricted. For instance, in certain offences against marriage, such as, adultery or, bigamy, no cognizance can be taken except upon complaint as prescribed in Section 198 of the Code of Criminal Procedure. In short, thus, it is for the Legislature to provide the mode of taking of cognizance and also the manner of taking of cognizance.

81. While sub-section (1) of Section 190 of the Code of Criminal Procedure prescribes, as pointed out above, three distinct modes of taking of cognizance, by a Magistrate, which includes taking of cognizance even upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed, a Special Court, constituted under the NIA Act, cannot, in the light of Section 16(1) of the NIA Act, take cognizance on the basis of information received or upon its own knowledge; it can take cognizance only on the basis of complaint or police report, as indicated above, by Section 16(1) of the NIA Act.

82. Should, therefore, a Special Court, under the NIA Act, be regarded as a Court of Magistrate, or, can it still be regarded as a Court of Session or is the Special Court, under the NIA Act, a combination of the Court of Magistrate and the Court of Session and, therefore, a Special Court is a class of Courts, which, notwithstanding the specified categories of Courts mentioned in Section 6 of the Code of Criminal Procedure, a special class of Court created by the "special law", namely, the NIA Act?

83. When a Special Court can take cognizance without a case being committed to it, unlike what is required to be done in the case of a Court of Session, it logically

follows that a Special Court is a court of original jurisdiction and cannot be regarded as a Court of Session except to the extent as provided by the NIA Act itself. The proposition, that a Special Court is not a Court of Session, is also supported by the fact that the NIA Act empowers a Special Court to try certain classes of offences, in a summary way, in the same manner as is done by a Magistrate in exercise of his powers under Sections 263 and 265 of the Code of Criminal Procedure.

84. The above aspect of law will become transparent, when one considers the case of A.R. Antulay Vs. Ramdas Sriniwas Nayak and Another, . In A.R. Antulay (supra), the question had arisen as to whether a Special Court, constituted under the P.C. Act Ed--sic--Cr. Law. Amdt. Act? 1952, could take cognizance on the basis of a private complaint and, in this regard, it was urged, inter alia, before the Supreme Court, that since a Court of Special Judge has all the trappings of the Court of Session, it cannot take cognizance on the basis of a complaint, as provided by Section 190 of the Code of Criminal Procedure, because Section 190 of the Code of Criminal Procedure confers power to take cognizance only on the Magistrate in any of the three modes prescribed therein and Section 190 of the Code of Criminal Procedure cannot be resorted by a Court of Session to be able to take cognizance of offence on the basis of a "complaint".

85. The Constitution Bench was, therefore, in A.R. Antulay (supra), called upon to decide the question as to whether the Court of Special Judge, under the PC Act, 1947, as stood amended by the Criminal Law (Amendment) Act, 1952, was a Court of Magistrate or a Court of Session.

86. Turning down the above argument, the Supreme Court pointed out, in A.R. Antulay (supra), that if Section 190 of the Code of Criminal Procedure cannot be availed by a Special Judge, none of the modes of taking of cognizance of offences, as mentioned in Section 190 of the Code of Criminal Procedure, would be available to a Special Judge. In the case of A.R. Antulay (supra), it was P.C. Act, 1947, which was in force and Sections 6 and 8 of this Act had fallen for interpretation by the Constitution Bench. Section 6 of the PC Act, 1947, (as amended in 1952) read as under:--

"6.(1) The State Government may, by notification in the official Gazette, appoint as many special Judges as may be necessary for such area as may be specified in the notification to try the following offences, namely:--

(a) an offence punishable under Sections 161, 162, 163, 164, 165 or Section 165-A of the Indian Penal Code or Section 5 of the Prevention of Corruption Act, 1947.

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in Clause (a).

(2) A person shall not be qualified for appointment as special Judge under this Act unless he is, or has been, a Sessions Judge or an Additional Sessions Judge

or an Assistant Sessions Judge under the Code of Criminal Procedure, 1898."

87. Thus, Section 6 of the PC Act, 1947, prescribed the offences, which could have been taken cognizance of and tried by a Special Judge. In the PC Act, 1988, it is, now, Section 3, which laid down the offence, which can be taken cognizance of and tried by a Special Judge. While in the PC Act, 1988, it is Section 5, which laid down the procedure and power of a Special Judge, it was Section 8 of the PC Act, 1947, which contained the procedure and power of a Special Judge. Section 8 of the PC Act, 1947, read as under:--

"8(1) A special Judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898, for the trial of warrant cases, by Magistrates.

(2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor in the commission thereof, and any pardon so tendered shall, for the purposes of Sections 339 and 339-A of the Code of Criminal Procedure, 1898, be deemed to have been tendered under Section 338 of that Code.

(3) Save as provided in sub-section (1) or sub-section (2) the provisions of the Code of Criminal Procedure, 1898, shall, so far as they are not consistent with this Act, apply to the proceedings before a special Judge and for the purposes of the said provisions, the Court of the special Judges shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.

(3-A) In particular, and without prejudice to the generality of the provisions contained in sub-section (3) the provisions of the Code of Criminal Procedure, 1898, shall so far as may be, apply to the proceedings before a special Judge, and for the purposes of the said provisions, a special Judge shall be deemed to be a Magistrate.

(4) A special Judge may pass upon any person convicted by him any sentence authorized by law for the punishment of the offence of which such person is convicted."

88. What is, now, of immense importance to note is that in terms of Section 8(3) of the PC Act, 1947, as well as in terms of Section 5(3) of the PC Act, 1988, a Special Judge may take cognizance of offence without the accused being committed to him for trial and, in trying the accused person, he shall follow the procedure, prescribed by the Code, for trial of warrant cases by the Magistrate and that while exercising its powers, the Court of a Special Judge shall be

deemed to be a Court of Session.

89. It was, therefore, contended, in A.R. Antulay (supra), that a Special Court is not a Court of Magistrate, though it can take cognizance without the case being committed to it for trial and, hence, unlike a Magistrate, a Special Judge could not have taken cognizance on the basis of a complaint of fact constituting the offence. The Constitution Bench, in A.R. Antulay (supra), having pointed out that the Code perceives four distinct modes of taking of cognizance of offence, noted that there is, apart from the four modes, which the Code prescribes, (and which we have already mentioned) for the purpose of taking of cognizance, no other known or recognized mode of taking of cognizance of an offence by a criminal court exists and, hence, if a Court of a Special Judge is a criminal court, it cannot take cognizance of offence except in any one of the modes, which the Code prescribes. The relevant observations, made in this regard, in A.R. Antulay (supra), read as under:--

"17. Now the Code of Criminal Procedure prescribed only four methods of taking cognizance of an offence whether it be by a Magistrate or a Sessions Court is for the time being immaterial. The Code prescribes four methods for taking cognizance upon a complaint, or upon a report of the police officer or where the Magistrate himself comes to know of the commission of offence through some other source and in the case of Sessions Court upon a commitment by the Magistrate. There is no other known or recognised mode of taking cognizance of an offence by a criminal court. Now if Court of Special Judge is a criminal court, which at least was not disputed, and jurisdiction is conferred upon the presiding officer of the Court of Special Judge to take cognizance of offences simultaneously excluding one out of the four recognised modes of taking cognizance, namely upon commitment by a Magistrate as set out in Section 193. the only other method by which the Court of Special Judge can take cognizance of an offence for the trial of which it was set up is any one of the remaining three other methods known to law by which a criminal court would take cognizance of an offence, not as an idle formality but with a view to initiating proceedings and ultimately to try the accused. If the language employed in Section 8(1) is read in this light and in this background that a Special Judge may take cognizance of offence without the accused being committed to him for trial, it necessarily implies that the Court of Special Judge is armed with power to take cognizance of offences but that it is denied the power to take cognizance on commitment by the Magistrate. This excludes the mode of taking cognizance under Section 193. Then remains only Section'' 190 which provides various methods of taking cognizance of offences by courts.

17. * * *

18....

Section 8(1) says that the Special Judge shall take cognizance of an offence and shall not take it on commitment of the accused. The Legislature provided for both the positive and the negative. It positively conferred power on Special Judge to take cognizance of offences and it negatively removed any concept of commitment. It is not possible therefore, to read Section 8(1) as canvassed on behalf of the Appellant that cognizance can only be taken upon a police report and any other view will render the safeguard under Section 5-A illusory.

19. * * *

20. * * *

21. * * *

22. * * *

23. Once Section 5-A is out of the way in the matter of taking cognizance of offences committed by public servants by a Special Judge, the power of the Special Judge to take cognizance of such offences conferred by Section 8(1) with only one limitation, in any one of the known methods of taking cognizance of offences by courts of original jurisdiction remains untended. One such statutorily recognised well-known method of taking cognizance of offences by a court competent to take cognizance is upon receiving a complaint of facts which constitutes the offence. And Section 8(1) says that the Special Judge has the power to take cognizance of offences enumerated in Section 6(1)(a) and (b) and the only mode of taking cognizance excluded by the provision is upon commitment. It therefore, follows that the Special Judge can take cognizance of offences committed by public servants upon receiving a complaint of facts constituting such offences.

24. * * *

25. * * *

26. For more than one reason it is not possible to accept this submission. If Section 190 cannot be availed, we fail to see how a Special Judge would be entitled to take cognizance on a police report. If Section 190 is not attracted all the three modalities of taking cognizance of offences would not be available. One cannot pick and choose as it suits one''s convenience. Either all the three modalities are available or none. And Section 8(1) which confers power of taking cognizance does not show any preference. On this short ground, the submission must be rejected." (Emphasis is added)

90. It has been pointed out by the Supreme Court, in A.R. Antulay (supra), that the Special Court is an addition to the classes of courts, which Section 6 of the Code provides for, and it is not necessary that a Special Court has to be either a Court of Magistrate or a Court of Session. Far from this, a Special Court, according to A.R. Antulay (supra), may be a combination of both.

91. Shorn of all embellishments, the Court of a Special Judge, Supreme Court observed, is a court of original criminal jurisdiction and, except those powers and functions, which are specifically conferred on such a court, or, specifically denied,

it has to function as a Court of original criminal jurisdiction not being hide-bound by the terminological status-description of Magistrate or a Court of Session and that it will enjoy all the powers, which a court of original jurisdiction enjoys, save and except the ones, which are specifically denied.

92. The Supreme Court reiterates, at paragraph 28 of A.R. Antulay (supra), that the Court of Special Judge has to be treated as a court of original criminal jurisdiction and shall have all the powers, which a Court of original criminal jurisdiction has under the Code, except those powers, which are specifically excluded.

93. Having examined the matter from different angles, the Supreme Court concluded, in A.R. Antulay (supra), that a private complaint, which may be filed by a complainant, is maintainable under the scheme of the P.C. Act Ed--sic--Cr. Law Amdt. Act?, 1952, and that a court of Special Judge can take cognizance on the basis of such a complaint. The relevant observations, which appear at paragraphs 27 and 28, in A.R. Antulay (supra), read as under:--

"27........... To take the cases of corruption out of the maze of cases handled by Magistrates, it was decided to set up special courts. Section 6 conferred power on the State Government to appoint as many Special Judges as may be necessary with power to try the offences set out in Clauses (a) and (b). Now if at this stage a reference is made to Section 6 of the Code of Criminal Procedure which provides for constitution of criminal courts, it would become clear that a new court with a new designation was being set up and that it has to be under the administrative and judicial superintendence of the High Court. As already pointed out, there were four types of criminal courts functioning under the High Court. To this list was added the Court of a Special Judge-Now when a new court which is indisputably a criminal court because it was not even whispered that the Court of Special Judge is not a criminal court, is set up to make it effective and functionally oriented, it becomes necessary to prescribe its powers, procedure, status and all ancillary provisions. While setting up a Court of a Special Judge keeping in view the fact that the high dignitaries in public life are likely to be tried by such a court, the qualification prescribed was that the person to be appointed as Special Judge has to be either a Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge. These three dignitaries are above the level of a Magistrate. After prescribing the qualification, the Legislature proceeded to confer power upon a Special Judge to take cognizance of offences for the trial of which a special court with exclusive jurisdiction was being set up. If a Special Judge has to take cognizance of offences, ipso facto the procedure for trial of such offences has to be prescribed. Now the Code prescribes different procedures for trial of cases by different courts. Procedure for trial of a case before a Court of Session is set out in Chapter XVIII; trial of warrant cases by Magistrates is set out in Chapter XIX and the provisions therein included catered to both the types of cases coming before the Magistrate, namely, upon police report or otherwise than on a police report. Chapter XX prescribes the procedure for trial of summons cases by Magistrates and Chapter XXI prescribes the procedure for summary trial. Now that a new criminal court was being set up the Legislature took the first step of providing its comparative position in the hierarchy of courts under Section 6 Code of Criminal Procedure by bringing it on level more or less comparable to the Court of Session but in order to avoid any confusion arising out of comparison by level, it was made explicit in Section 8(1) itself that it is not a Court of Session because it can take cognizance of offences without commitment as contemplated by Section 193 Code of Criminal Procedure. Undoubtedly in Section 8(3) it was clearly laid down that subject to the provisions of sub-sections (1) and (2) of Section 8, the Court of Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors. In contradistinction to the Sessions Court this new court was to be a Court of original jurisdiction. The Legislature then proceeded to specify which out of the various procedures set out in the Code, this new court shall follow for trial of offences before it. Section 8(1) specifically says that a Special Judge in trial of offences before him shall follow the procedure prescribed in the Code of Criminal Procedure for trial of warrant cases by Magistrates. The provisions for trial of warrant cases by the Magistrate are to be found in Chapter XXI of 1898 Code. A glance through the provisions will show that the provisions therein included catered to both the situations namely, trial of a case initiated upon police report (Section 251-A) and trial of cases instituted otherwise than on police report (Sections 252 to 257). If a Special Judge is enjoined with a duty to try cases according to the procedure prescribed in foregoing provisions he will have to first decide whether the case was instituted upon a police report or otherwise than on police report and follow the procedure in the relevant group of sections. Each of the Sections 251-A to 257 of 1898 Code which are in pari materia with Sections 238 to 250 of 1973 Code refers to what the Magistrate should do. Does the Special Judge therefore, become a Magistrate? This is the fallacy of the whole approach. In fact, in order to give full effect to Section 8(1), the only thing to do is to read Special Judge in Sections 238 to 250 wherever the expression "Magistrate" occurs. This is what is called legislation by incorporation. Similarly, where the question of taking cognizance arises, it is futile to go in search of the fact whether for purposes of Section 190 which conferred power on the Magistrate to take cognizance of the offence. Special Judge is a Magistrate? What is to be done is that one has to read the expression "Special Judge" in place of Magistrate and the whole thing becomes crystal clear.... When taking cognizance, a Court of Special Judge enjoyed the powers under Section 190. When trying cases it is obligatory to follow the procedure for trial of warrant cases by a Magistrate though as and by way of status it was equated with a Court of Session. The entire argument inviting us to specifically decide whether a Court of a Special Judge for a certain purpose is a Court of Magistrate or a Court of Session revolves round a mistaken belief that a Special Judge has to be one or the other, and must fit in the Slot of a Magistrate or a Court of Session. Such an approach would strangulate the functioning of the court and must be eschewed. Shorn of all embellishment, the Court of a Special Judge is a Court of original criminal jurisdiction. As a Court of original criminal jurisdiction in order to make it functionally oriented some powers were conferred by the statute setting up the court. Except those specifically conferred and specifically denied it has to function as a Court of original criminal jurisdiction not being hidebound by the terminological status description of Magistrate or a Court of Session. Under the Code it will enjoy all powers which a Court of original criminal jurisdiction enjoys save and except the ones specifically denied.

28. Section 9 of the 1952 Act would equally be helpful in this behalf. Once Court of a Special Judge is a Court of original criminal jurisdiction, it became necessary to provide whether it is subordinate to the High Court, whether appeal and revision against its judgments and orders would lie to the High Court and whether the High Court would have general superintendence over a Court of Special Judge as it has over all criminal courts as enumerated in Section 6 of the Code of Criminal Procedure. The Court of a Special Judge, once created by an independent statute, has been brought as a Court of original criminal jurisdiction under the High Court because Section 9 confers on the High Court all the powers conferred by Chapters XXXI and XXXIII of the Code of Criminal Procedure, 1898 on a High Court as if the Court of Special Judge were a Court of Session trying cases without a jury within the local limit of the jurisdiction of the High Court. Therefore, there is no gainsaying the fact that a new criminal court with a name, designation and qualification of the officer eligible to preside over it with powers specified and the particular procedure which it must follow has been set up under the 1952 Act. The court has to be treated as a Court of original criminal jurisdiction and shall have all the powers as any Court of original criminal jurisdiction has under the Code of Criminal Procedure, except those specifically excluded.(Emphasis is added)

94. Section 5(3) of the P.C. Act, 1988, read as under:

"save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor"; whereas Section 16(3) of the NIA Act reads, "subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session".

95. If the provisions, contained in Section 5(3) of the P.C. Act, 1988, and Section 16(3) of the NIA Act are dispassionately analyzed, it becomes clear that under the NIA Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as the procedure, prescribed in the Code, for trial before a

Court of Session is concerned.

96. The expression, "as if it were a Court of Session", appearing in Section 16(3) of the NIA Act, does not mean that the Special Court would become a Court of Session or, when a Special Court is not constituted, the Court of Session, while functioning as the Special Court under the NIA Act, will remain as a Court of Session.

97. Thus, as far as the trial of Scheduled offences are concerned, the Special Court will have the power of the Court of Session as far as such power is, in the light of the modified provisions of the NIA Act, exercisable as regards the procedure of trial by the Special Court or the Court of Session, as the case may be. But, so far as taking of cognizance of Scheduled offences is concerned, the Special Court''s role is of the Court of original criminal jurisdiction.

98. Notwithstanding, therefore, the fact that while functioning as a trial Court, the Special Court or, in the absence of constitution of a Special Court, a Court of Session shall be treated "as if it were a Court of Session", the fact of the matter, in the light of A.R. Antulay (supra), remains that irrespective of the fact as to whether a Special Court has been constituted or not under the NIA Act, a Special Court, if constituted, or the Court of Session, if the Special Court has not been constituted, is, under the NIA Act, not a Court of Session, this Special Court does not suffer from the trappings of a Court of Session and, while trying an offence, it has to follow, so far as applicable, the procedure for trial of a sessions case, as envisaged by the Code.

IS THE SPECIAL COURT. UNDER THE NIA ACT. EMPOWERED TO PASS ORDERS OF REMAND OF AN ACCUSED AS ORDINARILY EXERCISABLE BY A MAGISTRATE IN TERMS OF THE PROVISIONS OF SECTION 167(21 OF THE CODE OF CRIMINAL PROCEDURE?

99. What surfaces from the above discussion is that a Special Court, under the NIA Act, will remain, for the purposes, other than trial, a Court of original criminal jurisdiction. Necessarily, therefore, such a Court, being a Court of original jurisdiction, is the appropriate Court (and not the Court of Magistrate), which can authorize detention of a person accused of having committed an offence under the NIA Act and remand him to custody, police or judicial, in terms of the provisions of Section 167(2) of the Code of Criminal Procedure.

100. Thus, a Special Court, under the NIA Act, also exercises the power of a Magistrate as contemplated under Section 167 of the Code of Criminal. Procedure, when the case is pending for investigation, though such a Court has the power of a Court of Session so far as the trial is concerned except, of course, to the extent as its power may stand modified by the relevant provisions of the statute enacted in this regard. It is only in exceptional circumstances, as provided by Section 167(2-A) of the Code of Criminal Procedure, that an accused, who is arrested in connection with an offence, under such a "special law", as the NIA Act is, can he be produced before a Magistrate for the purpose

of transit to the Special Court if immediate production, as envisaged by Section 167 of the Code of Criminal Procedure, before the Special Court of competent jurisdiction, is not possible, or unless the ''special law'' itself provides for such powers of production before a Magistrate.

101. For instance, in a case, under the Narcotic Drugs and Psychotropic Substances Act, 1985, (in short, the NDPS Act''), production of an arrested accused before a Judicial Magistrate, instead of a Special Court, is permissible, and such Magistrate may order detention of such a person, in custody, for a period not exceeding fifteen days. This can be well-understood by a reference to the scheme of the NDPS Act, which empowers a Special Court to take cognizance of an offence on the basis of ''police report''.

102. Since no commitment, as provided in Section 209 of the Code of Criminal Procedure, is required to be made in the NDPS Act, the power to remand the accused to the police or judicial custody has to be exercised by the Special Court constituted under the NDPS Act.

103. In order to, however, enable the investigating agency to produce an accused in connection with an offence under the NDPS Act, before a Court other than a Special Court, specific provisions, in the form of Section 36(a)(b) in the NDPS Act, have been made, which empower a Magistrate to remand to custody such an accused for the initial period of 15 days. But, thereafter, the accused can be detained only on the basis of remand order passed by the Special Court or where the Special Court, under the NDPS Act, has not been constituted, by the Court of Session.

104. As a corollary, what one can very safely conclude is that unless a ''special law'' provides a Magistrate to pass orders of remand despite the Special Court (if the Special Court has been constituted or the Court of Session, when a Special Court has not been constituted), no order of remand of such an accused can be made by a Magistrate except during the transit period as contemplated by Section 167(2-A) of the Code of Criminal Procedure or where the statute itself provides for such production before some other authority, such as, a Judicial Magistrate, same as in the case of NDPS Act.

THE SCOPE OR POWER TO GRANT BAIL BY A SPECIAL COURT UNDER THE NIA ACT IS IN TERMS OF SECTION 437 OF THE CODE OF CRIMINAL PROCEDURE OR SECTION 439 OF THE CODE OF CRIMINAL PROCEDURE?

105. Now, the question is: when such an arrested person applies for bail, whether the application for bail, so made, would be treated to be an application under Section 439 of the Code of Criminal Procedure on the ground that a Special Court has the power of a Court of Session so far as the procedure for trial of the scheduled offence is concerned or is the Special Court, when such Court is constituted, or the Court of Session, when the Special Court has not been constituted, as the case may be, can entertain such an application for bail only in terms of Section 437 of the Code of Criminal Procedure?

106. More explicitly speaking, the question, therefore, is this: When a person, arrested in connection with a scheduled offence, is, on being taken into custody, brought, or pursuant to the fact that he is wanted in connection with a scheduled offence, appears, before a Special Court, when a Special Court stands constituted under the NIA Act, or before a Court of Session, when the Special Court has not been constituted, what is the source of power, if any, of the Special or of the Court of Session, as the case may be, to consider an application for bail if such an accused applies for bail? Will a Special Court or Court of Session exercise powers in respect of such an application for bail under Section 437 or 439 of the Code of Criminal Procedure or under some other provisions of the NIA Act?

107. In order to reach a correct answer to the question, posed above, one has to carefully analyze the provisions of Section 437 vis-a-vis Section 439 of the Code of Criminal Procedure. With this end in view, both these Sections are reproduced hereinbelow:--

"437. When bail may be taken in case of non-bailable offence.--(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of Sessions, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in Clause (i) or Clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in Clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason.

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of Section 446-A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI of the Indian Penal Code (45 of 1860) or abetment of, or attempt to commit, any such offence, is released on bail under sub-section (1) the Court shall impose the conditions,--

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) I that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under sub-section (1), or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under sub-section (1), or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of any non-bailable offence and before judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

439. Special powers of High Court or Court of Session regarding bail.--(1) A High Court or Court of Session may direct--

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified"

108. From a careful reading of the provisions contained in Section 437(1) of the Code of Criminal Procedure, what becomes transparent is that Section 437(1) of the Code of Criminal Procedure gives power to grant bail to a court ''other than the High Court or Court of Session''. Admittedly, a Special Court, under the NIA Act, is not a Court of Session and even the Court of Session, while acting as the Special Court under the NIA Act, does not, as already discussed above, act as a Court of Session. The Special Court is also not a High Court, for, a Special Court, as defined in Section 2(h) of the NIA Act, is a Court, which is constituted, under Section 11 of the NIA Act, by the Central Government or, under Section 22 of the NIA Act, by a State Government. The expression, ''a Court other than the High Court, or the Court of Session'', has very wide meaning and includes, within its ambit, not only the Magisterial Courts, but all such Courts, including a Special Court, which do not fall within the expressions, ''the High Court or ''the Court of Session''. A Special Court, under the NIA Act, not being a High Court, or a Court of Session, would obviously fall within the expression ''a Court other than the High Court or the Court of Session''.

109. It is also well to remember that merely because of the fact that a Court of Session can function as a Special Court if Special Court is not constituted under a special law, it does not follow that the Court of Session, which exercises the powers of the Special Court, would become a Court of Session. In the given scheme of a ''special law'', a Court of Session, as already pointed out in A.R. Antulay (supra), may become a Court of original jurisdiction with no trappings of the Court of Session,

110. In the circumstances, indicated above, merely because of the fact that a Sessions Judge exercises the jurisdiction of a Special Court, the Special Court would not be treated, or would not be deemed, to have become, a Court of Session.

111. When the Special Court, in the case at hand, falls within the expression, ''a Court other than the High Court or the Court of Session'', which appears in Section 437(1) of the Code of Criminal Procedure, it logically follows that a Special Court would run all the limitations, which are imposed by Section 437 of the Code of Criminal Procedure on the powers of a Court, covered by Section 437 of the Code of Criminal Procedure, in respect of granting of bail.

112. Logically extended, this will mean that, amongst other limitations, as specified by sub-section (1) of Section 437 of the Code of Criminal Procedure, a Special Court would not be able to release a person on bail if there appears a reasonable ground for believing that he has been guilty of offences punishable with death or imprisonment for life except when a case is covered by the proviso to Section 437(1) of the Code of Criminal Procedure, which says that even such an accused person may be released, if the accused person is a woman or is sick or is infirm or if, for any other special reason, the Special Court considers it just and proper to release such a person.

113. Unlike, therefore, the powers, which a Court of Session enjoys, while considering a bail application, under Section 439 of the Code of Criminal Procedure, the Special Court runs the limitations, which are imposed by Section 437 of the Code of Criminal Procedure.

114. Resultantly, therefore, a Special Court cannot enlarge a person on bail except to the extent as provided in Section 437 of the Code of Criminal Procedure. Apart from the limitations imposed on the powers of a Special Court as are prescribed by Section 437 of the Code of Criminal Procedure, even the special statute, which creates the Special Court, can impose additional limitations.

115. No wonder, therefore, that the power to grant bail, in the case of NDPS, is much more restricted than what Section 437 of the Code of Criminal Procedure provides inasmuch as Section 37 of the NDPS imposes further limitations, on the Special Court, in matters of granting bail and such limitations would apply to a Sessions Judge even if he acts as a Special Court under the NDPS Act, for, while exercising the powers of a Special Court, the Session Judge does not act or function as a Court of Session, but as a Court of ordinary criminal jurisdiction.

116. We may pause, at this stage, to point out that with the object of prevention of, and for coping with terrorist and disruptive activities and for matters connected with or incidental thereto, the TADA, was enacted. Section 20(8) of the TADA contained provisions with regard to the Designated Court''s power to grant bail, the Designated Court being a Court constituted, under the TADA, to try offences under the TADA. Section 20(8) read:--

"(8) Notwithstanding anything contained in the Code, no person, accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless,--

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

117. In Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, , the Supreme Court had an occasion to consider the question as to whether Section

439 of the Code of Criminal Procedure could be invoked by a person accused of an offence under the TADA?

118. Yet another question, which arose, in Usmanbhai Dawoodbhai Memon (supra), was as to whether the source of power of the Designated Court to grant bail was Section 20(8) of the TADA, which we have quoted above, or Section 437 of the Code of Criminal Procedure.

119. In, Usmanbhai Dawoodbhai Memon (supra), the application for bail having been refused by the Designated Court constituted under the TADA Act, the accused had applied for bail to the High Court under Section 439 read with Section 482 of the Code of Criminal Procedure. The High Court rejected the bail application on the ground that it had no jurisdiction to entertain any such application under Section 439 of the Code of Criminal Procedure or by taking recourse to its inherent powers under Section 482 of the Code of Criminal Procedure. The reason, assigned by the High Court, was that the TADA Act, being a special enactment and the Designated Court, constituted thereunder, not being a Court subordinate to the High Court, and, further, that in view of the provisions contained in sub-section (1) of Section 19 of the Act, which provided that an appeal, as a matter of right, shall lie, against any judgment, sentence or order of the Designated Court, not being an interlocutory order, to the Supreme Court, and in view also of the explicit bar, contained in sub-section (2) thereof, which provided that no appeal or revision shall lie before any court, there was exclusion of jurisdiction of the High Court in regard to the proceedings before a Designated Court.

120. It was also urged before the Supreme Court, in Usmanbhai Dawoodbhai Memon (supra), that since a Court of Session, in the absence of constitution of a Designated Court, can exercise the powers of the Designated Court, the source of power to grant bail is Section 439 and not Section 437 of the Code of Criminal Procedure. This was resisted by the Government by contending that the source of power of a Designated Court is really traceable to Section 437 of the Code of Criminal Procedure and not Section 439 of the Code of Criminal Procedure and that a Designated Court is nothing, but, ''a Court other than the High Court or the Court of Session'', an expression, which appears in sub-section (1) of Section 437 of the Code of Criminal Procedure. This construction was accepted by the Court in Usmanbhai Dawoodbhai Memon (supra).

121. The Supreme Court, therefore, pointed out, in Usmanbhai Dawoodbhai Memon (supra), that the use of ordinary courts does not imply use of standard procedure too. Just as the Legislature can create a special court to deal with a special problem, it can also create new procedures within the existing system and though the Parliament, in its wisdom, has adopted the framework of the Code, yet the Code is not applicable except to the extent as the provisions, contained in the TADA, make it possible to apply the provisions of the Code.

122. It is worth noticing that the Supreme Court pointed out, in Usmanbhai

Dawoodbhai Memon (supra), that the jurisdiction and power of a Designated Court are derived from the TADA and it is the TADA that one must, primarily, look to, for the purpose of deciding the question as to whether the Designated Court''s power to grant bail is relatable to Section 437 or 439 of the Code of Criminal Procedure and/or whether the High Court has the power to invoke its jurisdiction, under Section 439 or 482 of the Code of Criminal Procedure, to grant bail under the TADA, and, having examined the entire scheme of the TADA, the Supreme Court, in Usmanbhai Dawoodbhai Memon (supra), concluded that the source of the power of a Designated Court to consider bail is traceable to Section 437 and not to Section 439 of the Code of Criminal Procedure inasmuch as the Designated Court falls within the expression, "a Court other than the High Court or the Court of Session".

123. Similarly, in the case at hand, one has to, primarily, look into the provisions of the scheme of the NIA Act in order to determine if the power of the Special Court, or the Court of Session, as the case may be, in respect of grant of bail, is relatable to Section 437 or 439 of the Code of Criminal Procedure and/or whether the High Court has the power to grant bail to an accused, under the NIA Act, by invoking its jurisdiction under 439 of the Code of Criminal Procedure.

124. We may pause here to point out that Section 16(3) of the NIA Act states, "Subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session." Similar provisions existed in Section 14(3) of TADA. Both the provisions are, thus, pari material (sic--pari materia?).

125. The Supreme Court had the occasion to interpret Section 14(3) of the TADA in Usmanbhai Dawoodbhai Memon (supra). Referring to the expression "as if it were", appearing in Section 3 of the TADA, the Supreme Court pointed out, in Usmanbhai Dawoodbhai Memon (supra), that though the Parliament has vested, by using the words, "as if it were", in the Designated Court, the status of a Court of Session, yet this legal fiction, contained in Section 14(3), must be restricted to the procedure to be followed for trial of an offence under the TADA. i.e., trial must be in accordance with the procedure prescribed, by the Code, in respect of a trial before a Court of Session in so far as it is applicable. The relevant observations, made in this regard, in Usmanbhai Dawoodbhai Memon (supra), at paragraph 18 read as under:--

"18. No doubt, the legislature by the use of the words "as if it were'''' in Section 14(3) of the Act vested a Designated Court with the status of a Court of Session. But, as contended for by learned Counsel for the State Government, the legal fiction contained therein must be restricted to the procedure to be followed for the trial of an offence under the Act i.e. such trial must be in accordance with the procedure prescribed under the Code of the trial before a Court of Session, insofar as applicable. We must give some meaning to the opening words of

Section 14(3) "subject to the other provisions of the Act" and adopt a construction in furtherance of the object and purpose of the Act. The manifest intention of the legislature is to take away the jurisdiction and power of the High Court under the Code with respect to offences under the Act. No other construction is possible. The expression "High Court" is defined in Section 2(1)(e) but there are no functions and duties vested in the High Court. The only mention of the High Court is in Section 20(6) which provides that Sections 366-371 and Section 392 of the Code shall apply in relation to a case involving an offence triable by a Designated Court, subject to the modifications that the references to "Court of Session" and "High Court" shall be construed as references to "Designated Court" and "Supreme Court" respectively. Section 19(1) of the Act provides for a direct appeal, as of right, to the Supreme Court from any judgment or order of the Designated Court, not being an interlocutory order. There is thus a total departure from different classes of criminal courts enumerated in Section 6 of the Code and a new hierarchy of courts is sought to be established by providing for a direct appeal to the Supreme Court from any judgment or order of a Designated Court, not being an interlocutory order, and substituting the Supreme Court for the High Court by Section 20(6) in the matter of confirmation of a death sentence passed by a Designated Court."

126. Having held that the source of power of a Designated Court, under the TADA, to grant bail is traceable to Section 437 inasmuch as the Designated Court falls within the expression ''a Court other than the High Court or Court of Session'', the Supreme Court further clarified, in Usmanbhai Dawoodbhai Memon (supra), that the Designated Court''s power to grant bail is not contained in Section 20(8); rather, Section 20(8) places only limitations on such power in addition to the limitations, which the Code has already imposed, on a Designated Court, by making it a Court within the ambit of Section 437. This was made explicit by Section 20(9), which provided that the limitations on the granting of bail, specified in sub-section (8), are in addition to the limitations under the Code or any other law for the time being in force.

127. The Supreme Court has also pointed, in Ushmanbhai Dawoodbhai Memon (supra), that the powers of the High Court to entertain even an appeal has not been made available under the TADA inasmuch as an appeal lies, under Section 19 of the TADA, to the Supreme Court against any judgment, sentence or order passed by the Designated Court. Pointing out that the State has enacted TADA Act by treating terrorism as a special problem and created a Special Court to deal with such problem, the fact that even under the TADA, the ordinary courts are being used under the scheme of the Act, it does not as a corollary, imply that since the ordinary courts are being used, standard procedure, which ordinary courts adhere to, must be followed by the Special Court too. The Supreme Court has pointed out that when the Legislature can create a Special Court to deal with a special problem, it can also create a new procedure within the existing system and, in the case of TADA, while the Parliament, in its wisdom, has adopted the framework of the Code of Criminal Procedure, it has chosen not to apply the

procedures of the Code in its entirety and since the jurisdiction and the powers are derived by a Designated Court from the TADA, it is the TADA. which should decide the question as to whether a High Court can invoke its powers, under Section 439 and/or 482 of the Code of Criminal Procedure, for the purpose of considering an application for bail, or not. The relevant observations, appearing at paragraph 17, read:--

"17. The legislature by enacting the law has treated terrorism as a special criminal problem and created a special court called a Designated Court to deal with the special problem and provided for a special procedure for the trial of such offences. A grievance was made before us that the State Government by notification issued under Section 9(1) of the Act has appointed District and Sessions Judges as well as Additional District and Sessions Judges to be judges of such Designated Courts in the State. The use of ordinary courts does not necessarily imply the use of standard procedures. Just as the legislature can create a special court to deal with a special problem, it can also create new procedures within the existing system. Parliament in its wisdom has adopted the framework of the Code but the Code is not applicable. The Act is a special Act and creates a new class of offences called terrorist acts and disruptive activities as defined in Sections 3(1) and 4(2) and provides for a special procedure for the trial of such offences. Under Section 9(1), the Central Government or a State Government may by notification published in the Official Gazette, constitute one or more Designated Courts for the trial of offences under the Act for such area or areas, or for such case or class or group of cases as may be specified in the notification. The jurisdiction and power of a Designated Court is derived from the Act and it is the Act that one must primarily look to in deciding the question before us. Under Section 14(1), a Designated Court has exclusive jurisdiction for the trial of offences under the Act and by virtue of Section 12(1), it may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence. Where an enactment provides for a special procedure for the trial of certain offences, it is that procedure that must be followed and not the one prescribed by the Code."

128. Leaving no one in doubt that the source of power of a Designated Court, under the TADA, to grant bail is traceable to Section 437 of the Code of Criminal Procedure and not to Section 20(8) and that Section 20(8) merely imposes limitations in addition to the limitations, which Section 437 of the Code of Criminal Procedure already imposes, the Supreme Court observed and held, at paragraph 20, thus:--

"...It is quite obvious that the source of power of a Designated Court to grant bail is not Section 20(8) of the Act but it only places limitations on such powers. This is implicit by Section 20(9) which in terms provides that the limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail. It, therefore, follows that the power derived by a Designated Court to grant bail to a person accused of an offence under the Act, if in custody, is derived from the Code and not from Section 20(8) of the Act."

129. What emerges from the above discussion is that it is the Special Court under the NIA Act, or the Court of Session, when the Special Court has not been constituted, where an accused is required to be produced if he is arrested in connection with an offence punishable under the NIA Act and, upon his production, it is the Special Court or the Court of Session, as the case may be, which shall have the power to grant bail. The source of power of the Special Court or the Court of Session, as the case may be, to consider an application for bail is traceable to, and governed by, the provisions of Section 437 of the Code of Criminal Procedure and while considering such an application for bail, the Special Court or the Court of Session, as the case may be, will not exercise the power of bail as if it is considering an application for bail under Section 439 of the Code of Criminal Procedure and, consequently, the Special Court or the Court of Session, as the case may be, would have all the limitations, which a Magistrate has, while deciding an application for bail, under Section 437 of the Code of Criminal Procedure.

130. Having, thus, settled the fact that under the NIA Act, the Special Court or the Court of Session, as the case may be, exercises the power to grant, or refuse bail, by taking recourse to Section 437 of the Code of Criminal Procedure and not any other provisions of the Code, not even Section 439 of the Code of Criminal Procedure thereof, or under any of the provisions of the NIA Act, we, now, turn to the question as to whether a High Court, within the scheme of the NIA Act, can take resort to Section 439 of the Code of Criminal Procedure, particularly, when the Court of Session, while acting as a Special Court, under the NIA Act, is denuded of its power contained in Section 439 of the Code of Criminal Procedure.

131. Before proceeding further, it may be noted that Section 20(7) of the TADA barred application of Section 438 of the Code of Criminal Procedure to the offence punishable under the TADA. Thus, the provisions, contained in Section 438 of the Code of Criminal Procedure, could not have been invoked by a High Court if a person, apprehending arrest in connection with an offence under the TADA, applied for pre-arrest bail; but there was no such express bar imposed on the High Court''s power as far as Section 439 of the Code of Criminal Procedure was concerned.

132. Recognizing the above distinction, the Supreme Court, in Usmanbhai Dawoodbhai Memon (supra), held that though there is no express provision excluding applicability of Section 439 of the Code of Criminal Procedure, similar to the one as contained in Section 20(7), which expressly barred the application of Section 438 of the Code of Criminal Procedure, the scheme of the TADA, if analyzed, leads to the same conclusion that applicability of Section 439 of the Code of Criminal Procedure stands barred. The relevant observations, made, in this regard, in Usmanbhai Dawoodbhai Memon (supra), at paragraph 19, read as under:--

"19. Though there is no express provision excluding the applicability of Section 439 of the Code similar to the one contained in Section 20(7) of the Act in relation to a case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, but that result must, by necessary implication, follow. It is true that the source of power of a Designated Court to grant bail is not Section 20(8) of the Act as it only places limitations on such power. This is made explicit by Section 20(9) which enacts that the limitations on granting of bail specified in Section 20(8) are "in addition to the limitations under the Code or any other law for the time being in force". But it does not necessarily follow that the power of a Designated Court to grant bail is relatable to Section 439 of the Code. It cannot be doubted that a Designated Court is "a court other than the High Court or the Court of Session" within the meaning of Section 437 of the Code. The exercise of the power to grant bail by a Designated Court is not only subject to the limitations contained therein, but is also subject to the limitations placed by Section 20(8) of the Act."

133. We may, now, pause here to point out that Section 19 of the TADA contained provisions for appeal, which read as under:--

"19. Appeal.--(1) Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law.

(2) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Designated Court.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the Appellant had sufficient cause for not preferring the appeal within the period of thirty days."

134. Sub-section (1) of Section 19 of the TADA made it clear that notwithstanding anything contained in the Code, an appeal would lie, as a matter of right, to the Supreme Court from any judgment, sentence or order, not being an interlocutory order, of a Designated Court, both on facts and on law. Section 19(2) of the TADA also made it clear that no other appeal or revision would lie to any Court from any judgment, sentence or order, including an interlocutory order, of a Designated Court. The effect was that since the High Court had no jurisdiction in respect of any judgment, sentence or order, including an interlocutory order, of a Designated Court to entertain an appeal or a revision, it logically followed that even in respect of an order, refusing bail, which is an interlocutory order, no appeal or revision could have lied to the High Court against the order of a designated Court refusing to grant bail.

135. Making the above position of law clear, the Supreme Court, in Usmanbhai Dawoodbhai Memon (supra), observed that though, unlike Section 20(7), which expressly barred the High Courts from entertaining an application for pre-arrest bail under Section 438 of the Code of Criminal Procedure in respect of an offence under the TADA, the jurisdiction of the High Court to entertain an appeal or revision, including an application under Section 439 of the Code of Criminal Procedure, stands, by necessary implication, excluded. The Supreme Court also pointed out, in Usmanbhai Dawoodbhai Memon (supra), that if it were held that the source of power of the Designated Court to grant bail is Section 439 of the Code of Criminal Procedure, it would imply that not only the High Court, but also the Court of Session would be entitled to grant bail on such terms as it deems fit, for, the power to grant bail, under Section 439 of the Code of Criminal Procedure, is unfettered by the conditions and limitations, which Section 437 of the Code of Criminal Procedure, otherwise, imposes; and it would, thus, run counter to the express prohibition contained in Section 20(8) of the Act, which enjoins that notwithstanding anything in the Code, no person, accused of an offence, punishable under the Act or any rule made thereunder, shall, if in custody, be released on bail unless the conditions set forth in Clauses (a) and (b) are satisfied.

136. The Supreme Court pointed out, in Usmanbhai Dawoodbhai Memon (supra), that it all depends on the scheme of a particular enactment as to whether the power of the High Court and/or of the Court of Session to grant bail, under Sections 438 and 439 of the Code of Criminal Procedure, exists or not. The Supreme Court, in Usmanbhai Dawoodbhai Memon (supra), upheld the view expressed by the High Court that it had no jurisdiction to entertain an application for bail under Section 439 or under Section 482 of the Code of Criminal Procedure. The relevant observations, made in this regard, at paragraph 22, in Usmanbhai Dawoodbhai Memon (supra), read:--

"22. Upon that view, the court in Balchand Jain case held that Rule 184 of the Defence and Internal Security of India Rules, 1971, does not take away the power conferred on a Court of Session or a High Court under Section 438 of the Code to grant anticipatory bail. We have been referred to the decision of R.S. Pathak, C.J. speaking for a Division Bench of the Himachal Pradesh High Court in Ishwar Chand vs. State of Himachal Pradesh holding that Rule 184 did not affect the jurisdiction and power of the High Court under Sections 438 and 439 of the Code which were independent of the power of the special tribunal to try an offence for contravention of an order made under Section 3 of the Defence and Internal Security of India Act, 1971. Both these decisions are clearly distinguishable. The view expressed in Balchand Jain case is not applicable at all for more than one reason. There was nothing in the Defence and Internal Security of India Act or the Rules framed thereunder which would exclude the jurisdiction and power of the High Court altogether. On the contrary, Section 12(2) of that Act expressly vested in the High Court the appellate jurisdiction in certain specified cases. In view of the explicit bar in Section 19(2), there is exclusion of the jurisdiction of the High Court. It interdicts that no appeal or revision shall lie to any court, including the High Court, against any judgment, sentence or order, not being an interlocutory order, of a Designated Court. The Act by Section 16(1) confers the right of appeal both on facts as well as on law to the Supreme Court. Further, while it is true that Chapter 33 of the Code is still preserved as otherwise the Designated Courts would have no power to grant bail, still the source of power is not Section 439 of the Code but Section 437 being a court other than the High Court or the Court of Session. Any other view would lead to an anomalous situation. If it were to be held that the power of a Designated Court to grant bail was relatable to Section 439 it would imply that not only the High Court but also the Court of Session would be entitled to grant bail on such terms as they deem fit. The power to grant bail under Section 439 is unfettered by any conditions and limitations like Section 437. It would run counter to the express prohibition contained in Section 20(8) of the Act which enjoins that notwithstanding anything in the Code, no person accused of an offence punishable under the Act or any rule made thereunder shall, if in custody, be released on bail unless the conditions set forth in Clauses (a) and (b) are satisfied. Lastly, both the decision in Balchand Jain and that in Ishwar Chand turn on the scheme of the Defence and Internal Security of India Act, 1971. They proceed on the well recognized principle that an ouster of jurisdiction of the ordinary courts is not to be readily inferred except by express provision or by necessary implication. It all depends on the scheme of the particular Act as to whether the power of the High Court and the Court of Session to grant bail under Sections 438 and 439 exists. We must accordingly uphold the view expressed by the High Court that it had no jurisdiction to entertain an application for bail under Section 439 or under Section 482 of the Code."

137. Thus, in no uncertain words, the Supreme Court, in Usmanbhai Dawoodbhai Memon (supra), held that with regard to bail, under the TADA, the High Court''s jurisdiction, under Section 439 as well as Section 482 of the Code of Criminal Procedure, stood excluded.

138. In V.C. Shukla Vs. State through C.B.I., , the Supreme Court had pointed out that the expression ''interlocutory order'', which appeared in Section 19(1), was in contradistinction to what is known as ''final order'' and denoted an order of purely interim or temporary nature. The Supreme Court had further observed, in V.C. Shukla (supra), that it cannot be doubted that grant or refusal of bail is, essentially, an'' interlocutory order, for, there is no finality attached to an order granting or refusing bail and such an application for bail can always be renewed from time to time.

139. Referring to the above aspect of the law decided in V.C. Shukla (supra), the Supreme Court, in no uncertain words, observed, in this regard, at paragraph 24, in Usmanbhai Dawoodbhai Memon (supra), thus:--

"24. At the conclusion of the hearing on the legal aspect, Shri Poti, learned Counsel appearing for the State Government contended, on instructions, that an order passed by a Designated Court for grant or refusal of bail is not an "interlocutory order" within the meaning of Section 19(1) of the Act and therefore an appeal lies. We have considerable doubt and difficulty about the correctness of the proposition. The expression "interlocutory order" has been used in Section 19(1) in contradistinction to what is known as final order and denotes an order of purely interim or temporary nature. The essential test to distinguish one from the other has been discussed and formulated in several decisions of the Judicial Committee of the Privy Council, Federal Court and this Court. One of the tests generally accepted by the English Courts and the Federal Court is to see if the order is decided in one way, it may terminate the proceedings but if decided in another way, then the proceedings would continue. In V.C. Shukla vs. State, Fazal Ali, J. in delivering the majority judgment reviewed the entire case law on the subject and deduced therefrom the following two principles, namely, (i) that a final order has to be interpreted in contradistinction to an interlocutory order; and (ii) that the test for determining the finality of an order is whether the judgment or order finally disposed of the rights of the parties. It was observed that these principles apply to civil as well as to criminal cases. In criminal proceedings, the word "judgment" is intended to indicate the final order in a trial terminating in the conviction or acquittal of the accused. Applying these tests, it was held that an order framing a charge against an accused was not a final order but an interlocutory order within the meaning of Section 11(1) of the Special Courts Act, 1979 and therefore not appealable. It cannot be doubted that the grant or refusal of a bail application is essentially an interlocutory order. There is no finality to such an order for an application for bail can always be renewed from time to time. It is however contended that the refusal of bail by a Designated Court due to the non-fulfillment of the conditions laid down in Section 20(8) cannot be treated to be a final order for it affects the life or liberty of a citizen guaranteed under Article 21. While it is true that a person arraigned on a charge of having committed an offence punishable under the Act faces a prospect of prolonged incarceration in view of the provision contained in Section 20(8) which places limitations on the power of a Designated Court to grant bail, but that by itself is not decisive of the question as to whether an order of this nature is not an interlocutory order. The court must interpret the words "not being an interlocutory order" used in Section 19(1) in their natural sense in furtherance of the object and purpose of the Act to exclude any interference with the proceedings before a Designated Court at an intermediate stage. There is no finality attached to an order of a Designated Court granting or refusing bail. Such an application for bail can always be renewed from time to time. That being so, the contention advanced on behalf of the State Government that the impugned orders passed by the Designated Courts refusing to grant bail were not interlocutory orders and therefore appealable under Section 19(1) of the Act, cannot be accepted."

140. What surfaces from the above discussion is that Usmanbhai Dawoodbhai Memon (supra) held, in categorical terms, that neither the Designated Court nor

the High Court could have exercised power to grant bail by taking recourse to Section 439 of the Code of Criminal Procedure and whereas the Designated Court''s source of power to grant bail was traceable to Section 437 of the Code of Criminal Procedure, the High Court''s power to grant bail under Section 439 of the Code of Criminal Procedure stood wholly excluded. The Supreme Court also held, in Usmanbhai Dawoodbhai Memon (supra), that an order of bail, being an "interlocutory order", was also not an appealable order, under Section 19(1), to the Supreme Court.

141. Thus, if a Designated Court refused to grant bail to an accused under TADA, neither any of the provisions of the Code nor any of the provisions of the TADA, could have been resorted to for the purpose of granting bail by the High Court. In fact, a person, arrested under the TADA, had no remedy if the Designated Court refused to grant him bail except, perhaps, approaching the High Court under Article 226 and/or 227 of the Constitution of India or, in an appropriate case, the Supreme Court seeking to invoke its jurisdiction under Article 136 of the Constitution of India. It is for this reason that, in Usmanbhai Dawoodbhai Memon (supra), the Supreme Court exercised its powers, under Article 136 of the Constitution of India, to issue certain directions to the Designated Court.

142. In Narcotics Control Bureau Vs. Kishan Lal and others, , the question arose as to whether High Court''s power to grant bail under Section 439 of the Code of Criminal Procedure is restricted by the provisions of Section 37(2) of the NDPS Act. In Kishan Lal (supra), the Supreme Court had an occasion to refer to, and explain, the principles laid down in Usmanbhai Dawoodbhai Memon (supra) and pointed out that Usmanbhai Dawoodbhai Memon (supra) recognizes that fetters can be imposed on the powers of even the High Court in respect of granting bail under Section 439 of the Code of Criminal Procedure.

143. Referring to the decision in Usmanbhai Dawoodbhai Memon (supra), the Supreme Court observed, in Kishan Lal (supra), that it had been contended, in Usmanbhai Dawoodbhai Memon (supra), that to take away the power of the High Court to grant bail, under Section 439 of the Code of Criminal Procedure, would be tantamount to striking at the very foundation of an independent judiciary free from executive control, but disagreeing with such a view, the Supreme Court had held, in Usmanbhai Dawoodbhai Memon (supra), that the High Court''s power, under Section 439 of the Code of Criminal Procedure, did stand excluded.

WHETHER A HIGH COURT. WHILE DEALING WITH AN APPLICATION FOR BAIL MADE BY A PERSON. ACCUSED OF COMMISSION OF A SCHEDULED OFFENCE UNDER THE NIA ACT. EXERCISES POWER UNDER SECTION 439 OF THE CODE OF CRIMINAL PROCEDURE OR WOULD THE HIGH COURT BE GOVERNED BY THE PROVISIONS CONTAINED IN SECTION 21 OF THE NIA ACT. WHILE CONSIDERING THE QUESTION OF BAIL OF SUCH A PERSON?

144. While considering the above aspect of the NIA Act, we may point out that as there was not only serious resentment, but uproar against the manner in which

TADA had been enforced and the mechanism, conceived thereunder, were unutilized, the TADA was allowed to elapse. However, as the evils of terrorism continued, the Government sought to introduce the Prevention of Terrorism Bill, 2000. This Bill was forwarded to the Law Commission of India for its views and recommendations. The views and recommendations of the Law Commission of India appear in its 173rd Report. Chapter VI of this Report relates to "suggestions for inclusion of certain additional provisions in the bill". The relevant portion of Chapter VI is, therefore, extracted below:--

"CHAPTER-VI

SUGGESTIONS FOR INCLUSION OF CERTAIN ADDITIONAL PROVISIONS IN THE BILL

(a) It was suggested by Mr. Prashant Bhushan, Advocate, Supreme Court that there should be a provision for appeal against an order refusing bail. We are inclined to agree with this plea. But the appeal should be not only against an order refusing bail but also against an order granting bail. Accordingly, it recommended that the following provision be inserted as sub-section (5) in Section 17 of the Act:

(5) Notwithstanding anything contained in the Code, an appeal shall lie to the Special Court, against an order of the Court, granting or refusing bail."

145. From what have been extracted above, it becomes abundantly clear that since there was no provision for appeal, under the TADA, against an order refusing bail, it was suggested to the Law Commission that some provision for appeal against an order refusing bail should be made in the Prevention of Terrorism Bill, 2000. When this suggestion was offered to the Commission, the Commission took the view that if a right of appeal should be provided against an order refusing bail, it would be appropriate to provide an appeal against an order granting bail too. The Law Commission, therefore, suggested insertion of Section 17(5) to the proposed Bill, which, if incorporated, would have meant that notwithstanding anything, which the Code may contain, an appeal shall lie to the High Court against an order of a Special Court, to be constituted under the POTA, granting or refusing to grant bail. It is in this backdrop of legislative history that Section 34, which provided for appeal under the POTA Act, 2002, needs to be, now, considered. Section 34 is, therefore, reproduced below:--

"Appeal.--(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

Explanation.--For the purposes of this section, "High Court" means a High Court within whose jurisdiction, a Special Court which passed the judgment, sentence or order, is situated.

(2) Every appeal under sub-section (1) shall be heard by a bench of two Judges of the High Court.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in sub-section (3) of Section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the Appellant had sufficient cause for not preferring the appeal within the period of thirty days."

146. We, now, pause and refer to Section 21 of the NIA Act, which, too, make provisions for appeal. Section 21 of the NIA Act read as under:--

"21. Appeals.--(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

(2) Every appeal under sub-section (1) shall be heard by a bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in sub-section (3) of Section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the Appellant had sufficient cause for not preferring the appeal within the period of thirty days:

Provided further that no appeal shall be entertained after the expiry of period of ninety days."

147. A cautious and minute examination of Section 34 of the POTA vis-a-vis Section 21 of the NIA Act shows that sub-section (4) of Section 21 of the NIA Act and Section 34(4) of the POTA are pari material (sic--pari materia?). In fact, this position is not in dispute before us.

148. The Supreme Court dealt with Section 34 of the POTA, which contained provisions of appeal against an order refusing or granting bail, same as Section 21(4) of the NIA Act. In State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and Others, , the Gujarat High Court, by invoking Section 439, granted bail to

persons, accused of offence, punishable under POTA. This was put to challenge. The Supreme Court pointed out that Section 34(1) of the POTA lays down that an appeal shall lie from any judgment, sentence or order, not being an "interlocutory order'' of a Special Court, to the High Court both on facts and law. The relevant observations, made in this regard, read as under:--

"8. Sub-section (1) of Section 34 of POTA lays down that an appeal shall lie from any judgment, sentence or order not being an interlocutory order of a Special Court to the High Court both on facts and law and in view of sub-section (2), the appeal has to be heard by a Bench of two Judges. Normally an order granting or refusing bail is an interlocutory order and no appeal would lie. However, in view of sub-section (4) of Section 34 an appeal shall lie to the High Court against such an order. Under the scheme of POTA, there is a clear departure in the matter of grant of bail from that of the Code of Criminal Procedure. The provisions regarding bail in the Code of Criminal Procedure are contained in Sections 436 to 439. Subsection (1) of Section 439 confers power upon the Court of Session and the High Court to grant bail to any person accused of having committed a non-bailable offence. Sub-section (2) of Section 439 deals with cancellation of bail and provides that any person who has been released on bail under Chapter XXXIII may be arrested and committed to custody. There is no provision for appeal under the Code of Criminal Procedure against an order refusing or granting bail."

149. Referring to its earlier decisions, in The State Vs. Captain Jagjit Singh, and Gurcharan Singh and Others Vs. State (Delhi Administration), , the Supreme Court, in Salimbhai Abdulgaffar Shaikh (supra), observed:--

"9. The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in State vs. Capt. Jagjit Singh and Gurcharan Singh vs. State (Delhi Admn.) and basically they are--the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. While hearing an application for cancellation of bail under sub-section (2) of Section 439 of the Code, the courts generally do not examine the merits of the order granting bail. What is normally relevant to be examined in such a proceeding is whether the accused is trying to tamper with the evidence subsequent to his release on bail or has threatened the witnesses or has committed any other offence while on bail or is trying to adopt dilatory tactics resulting in delay of trial or has absconded or that the offence committed by him has created serious law and order problem. The court has, to see as to whether the accused has misused the privilege of bail granted to him. Only in exceptional cases where the order granting bail is vitiated by any serious infirmity and in the interest of justice it becomes necessary to interfere with the discretion exercised in granting bail that the order would be interfered with on merits."

150. Further explaining the scope of Section 34(4), the Supreme Court observed, in Salimbhai Abdulgaffar Shaikh (supra), at paragraphs 10 and 11, thus:--

"10. Sub-section (4) of Section 34 of POTA provides for an appeal to the High Court against an order of the Special Court granting or refusing bail. Though the word "appeal" is used both in the Code of Criminal Procedure and the Code of Civil Procedure and in many other statutes but it has not been defined anywhere. Over a period of time, it has acquired a definite connotation and meaning which is as under:--

A proceeding undertaken to have a decision reconsidered by bringing it to a higher authority, especially the submission of a lower court''s decision to a higher court for review and possible reversal.

An appeal, strictly so-called, is one in which the question is, whether the order of the court from which the appeal is brought was right on the material which the court had before it.

An appeal is removal of the cause from an inferior to one of superior jurisdiction for the purposes of obtaining a review or retrial.

An appeal, generally speaking, is a rehearing by a superior court on both law and fact.

11. Broadly speaking, therefore, an appeal is a proceeding taken to rectify an erroneous decision of a court by submitting the question to a higher court, and in view of the express language used in sub-section (1) of Section 34 of POTA the appeal would lie both on facts and on law. Therefore even an order granting bail can be examined on merits by the High Court without any kind of fetters on its powers and it can come to an independent conclusion whether the accused deserves to be released on bail on the merits of the case. The considerations which are generally relevant in the matter of cancellation of bail under sub-section (2) of Section 439 of the Code will not come in the way of the High Court in setting aside an order of the Special Court granting bail. It is, therefore, evident that the provisions of POTA are in clear contradistinction with that of the Code of Criminal Procedure where no appeal is provided against an order granting bail. The appeal can lie only against an order of the Special Court and unless there is an order of the Special Court refusing bail, the accused will have no right to file an appeal before the High Court praying for grant of bail to them. Existence of an order of the Special Court is, therefore, a sine qua non for approaching the High Court."

151. In the light of the observations made above, in Salimbhai Abdulgaffar Shaikh (supra), it becomes clear that an appeal is a proceeding to rectify an erroneous decision of a Court both on facts as well as on law. An order, granting or refusing bail, could have been, in the light of the provisions of Section 34(4), examined on merit by the High Court without any other fetters and while

considering a question of cancellation of bail, the general principles, governing Section 439(2) of the Code of Criminal Procedure, would not come in the way. The Supreme Court, in Salimbhai Abdulgaffar Shaikh (supra), while laying down that the scheme for appeal, under the POTA, is in contradistinction to that of the Code, pointed out that an appeal can lie only against an order of the Special Court and unless there is an order of the Special Court refusing or granting bail, the accused cannot prefer appeal to the High Court seeking bail. What, further, follows from the above discussion is that even a High Court could not have invoked its power, under the Section 439 of the Code of Criminal Procedure, to grant bail to a person, accused of an offence under the POTA.

152. Consequently, in order to obtain release on bail, an accused person, arrested under the POTA, was required to, first, apply for bail to the Special Court, where the Special Court was constituted, or to the Court of Session, where the Special Court was not constituted, and, if his application for bail was rejected, then and then only he could have preferred an appeal against the order refusing bail. Similarly, even the State could have preferred an appeal if the Special Court or the Court of Session, as the case may be, happened to grant bail to such an accused person in exercise of powers under Section 437 of the Code of Criminal Procedure.

153. Though it was contended, in Salimbhai Abdulgaffar Shaikh (supra), that TADA had not taken away the High Court''s power under Section 439 of the Code of Criminal Procedure, the Supreme Court, referring to Usmanbhai Dawoodbhai Memon (supra), held that there was complete exclusion of the jurisdiction of the High Court, under the TADA, to entertain a bail application made under Section 439 of the Code of Criminal Procedure and that this view was reiterated in State of Punjab Vs. Kewal Singh and Another, . The Supreme Court concluded, at paragraph 14, in Salimbhai Abdulgaffar Shaikh (supra), thus:--

"14. That apart, if the argument of the learned Counsel for the Respondents is accepted, it would mean that a person whose bail under POTA has been rejected by the Special Court will have two remedies and he can avail any one of them at his sweet will. He may move a bail application before the High Court under Section 439 Code of Criminal Procedure in the original or concurrent jurisdiction, which may be heard by a Single Judge or may prefer an appeal under sub-section (4) of Section 34 of POTA which would be heard by a Bench of two Judges. To interpret a statutory provision in such a manner that a court can exercise both appellate and original jurisdiction in respect of the same matter will lead to an incongruous situation. The contention is therefore fallacious."

154. In the light of what has been laid down in Salimbhai Abdulgaffar Shaikh (supra), there can be no escape from the conclusion that Section 34(4) of the POTA had made provisions for appeal if an application for bail made to the Special Court was rejected or if bail was granted. In either case, provisions for appeal were, thus, made.

155. It is, now, imperative to point out that Section 21(4) of the NIA Act is in no way different from Section 34(4) of the POTA. Both the provisions are not only similar, but also same. Hence, the provisions, contained in Section 21(4) of the NIA Act, and the provisions, contained in Section 34(4) of the POTA, can be given one and the same meaning.

156. Situated thus, it becomes clear that when a person is forwarded to a Special Court, where the Special Court is constituted, or to the Court of Session, where no Special Court is constituted, the accused can make an application for bail; but this application would fall under Section 437 of the Code of Criminal Procedure and not under Section 439 of the Code of Criminal Procedure, though even a Court of Session, in the absence of constitution of a Special Court, may be the Court to which such an accused is forwarded.

157. An accused, who has been taken into custody in connection with any offence under the NIA Act, cannot apply to the High Court seeking bail, under Section 439 of the Code of Criminal Procedure, without making any application to the Special Court or Court of Session, as the case may be, under Section 437 of the Code of Criminal Procedure nor can the accused, on rejection of his application for bail by the Special or the Court of Session, as the case may be, under the NIA Act, apply to the High Court to invoke the High Court''s jurisdiction under Section 439 of the Code of Criminal Procedure.

158. However, an accused may, in terms of provisions of Section 21(4) of the NIA Act, prefer an appeal to the High Court, against an order passed by the Special Court, or the Court of Session, as the case may be, refusing to enlarge him on bail. If a Special Court or Court of Session, as the case may be, grants bail under the NIA Act, the State cannot invoke High Court''s powers, under Section 439(2) of the Code of Criminal Procedure for cancellation of such bail. The remedy of the State lies, in such a case, in preferring an appeal, in terms of Section 21(4) of the NIA Act, to the High Court for cancellation of bail and if such an appeal is preferred, it would remain open to the High Court to examine the order, granting bail, on merit and determine if bail could at all have been granted to the accused by the Special Court or the Court of Session, as the case may be. At the same time, it would also remain open to the High Court to determine if the accused, having received bail, has misused his liberty and, whether his bail should, therefore, be cancelled or not.

159. We have already pointed out above that while conducting investigation, holding enquiry or trial or, otherwise, dealing with a case, even under a special law, the provisions of the Code would apply so far as the provisions of the Code may remain applicable in the face of the scheme of the special enactment.

160. The provisions for appeal, against acquittal, have been made in Section 378 of the Code of Criminal Procedure. An appeal against acquittal is not admissible without leave having been granted by the High Court in terms of sub-section (3) of Section 378 of the Code of Criminal Procedure.

161. When an order, granting or refusing bail, has been made appealable by sub-section (4) of Section 21 of the NIA Act, a question could have arisen as to whether a State''s appeal, against granting of bail, would require leave of the High Court. It is to override any such objections, which might have been raised, or the impediments, which the State might have suffered from, it appears that the Parliament, as a measure of abundant caution, deemed it appropriate to introduce, into sub-section (4) of Section 21 of the NIA Act, nonobstante clause by using the expression, "not with standing anything contained in sub-section (3) of Section 378 of the Code" so that the State''s appeal against an order granting bail does not require leave of the High Court.

162. Thus, sub-section (4) of Section 21 of the NIA Act has overriding effect on the limitations placed by sub-section (3) of Section 378 of the Code of Criminal Procedure. In view, therefore, of the fact that a reference to sub-section (3) of Section 378 of the Code of Criminal Procedure has been made in sub-section (4) of the Section 21 of the NIA Act, it does not mean that an order of the Special Court, granting or refusing bail, in a pending proceeding, is not an appealable order:

163. Recently, in the case of the State of Andhra Pradesh Vs. Md. Hussain @ Saleem, , the Supreme Court had the occasion to examine the issue as to whether an application under Section 439 of the Code of Criminal Procedure would be maintainable before the Single Bench of High Court. Having referred to its earlier decision in Usmanbhai Dawoodbhai Memon (supra) and Section 21 of the NIA Act, the Supreme Court has held that though grant or refusal of bail is, ordinarily, an interlocutory order, such an order is appealable under Section 21 of the NIA Act and, therefore, the High Court cannot exercise its power under Section 439 or 482 of the Code of Criminal Procedure for the purpose of granting or refusing to grant bail; rather the High Court exercises the power of an appellate Court in terms of the provisions of Section 21 of the NIA Act. The Supreme Court, in Usmanbhai Dawoodbhai Memon (supra), summarized its findings as follows:--

"(a) Firstly, an appeal from an order of the Special Court under NIA Act, refusing or granting bail shall lie only to a bench of two Judges of the High Court.

(b) And, secondly as far as prayer (b) of the petition for clarification is concerned, it is made clear that inasmuch as the applicant is being prosecuted for the offences under the MCOC Act, 1999, as well as The Unlawful Activities (Prevention) Act, 1967, such offences are triable only by Special Court, and therefore application for bail in such matters will have to be made before the Special Court under the NIA Act, 2008, and shall not lie before the High Court either under Section 439 or under Section 482 of the Code. The application for bail filed by the applicant in the present case is not maintainable before the High Court.

Thus, where the NIA Act applies, the original application for bail shall lie only before the Special Court, and appeal against the orders therein shall lie only to a bench of two Judges of the High Court.

(Emphasis is added)

IMITATIONS FOR BAIL:

164. We have already pointed out that the source of power to grant bail in a case involving scheduled offence, is Section 437 of the Code of Criminal Procedure. In the present case, charge-sheet has been laid, amongst other, for the offences under Section 17 of the UAP Act, as amended. Section 17 falls within Chapter VI of the UAP Act. After the 2004 amendments to UAP Act, subsequently retained in the 2008 Amendments, some stringent conditions were put by the Parliament on the powers of Special Court to grant bail.

CONCEPT OF PROVISO TO SECTION 43-D(5):

165. The proviso to Section 43-D(5) states that an accused person shall not be released on bail, or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure, is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. The expression, ''prima facie true'' is an expression, which does not, ordinarily, appear in penal statutes.

166. Let us, therefore, ascertain as to what the word prima facie'' means. The word, prima facie, has been described in the Black''s Law Dictionary as: "sufficient to establish fact or raise a presumption unless disproved or rebutted". Rebuttable presumption means an inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence. Rebuttable presumption also means prima facie presumption or disputable presumption or conditional presumption.

167. The Concise Dictionary of Collins has defined, prima facie, as an adjective thus: "At first sight; as it seems at first." And prima facie evidence as an evidence that is sufficient to establish a fact or to raise a presumption of the truth unless controverted.

168. Warton''s Law Lexicon defines that a prima facie case does not mean a case proved to the hilt, but a case, which can be said to be established if the evidence, which is led in support of the same, are believed.

169. The Supreme Court, in Martin Burn Ltd. Vs. R.N. Banerjee, , observed thus:--

"...A prima facie case does not mean a case proved to the hilt but a case, which can be said to be established if the evidence, which is led in support of the same, were believed. While determining whether a prima facie case had been made out, the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion, in question, and not whether that was the only conclusion, which could be arrived at on that evidence."

170. The meaning of the word, ''prima facie'', given in Marlin Burn Ltd. (supra), has been followed by the Supreme Court, in its later decision, in The Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. Vs. B. Dasappa, M. T. represented by the Binny Mills Labour Association, .

171. From the meaning, attributed to the word, "prima facie", by various dictionaries, as indicated above, and the observations, made by the Supreme Court, in its decisions, in the Management of the Bangalore Woollen Cotton and Silk Mills (supra), what clearly follows is that prima facie is a Latin word, which means, "At first sight or glance or on its face" and, in common law, it is referred to as "the first piece of evidence of fact", i.e., considered true unless revoked or contradicted.

172. In the face of the above observations made by the Supreme Court, it may be construed that prima facie case would mean whether the inference drawn is a possible inference or not.

173. The word, "true", according to Collins Dictionary, means something, which is not false, fictional or illusory, but factual and confirming with reality or exactly in tune. Webster''s Third New International Dictionary defines True as:--

"Something, which is in accordance with fact or reality."

174. The word, "true" has been defined, in World Book Dictionary, as "Agreeing with fact, not false".

175. Thus, the expression, "prima facie true", would mean that the Court shall undertake an exercise to determine as to whether the accusations, made against the accused, are inherently improbable and/or wholly unbelievable. Ordinarily, while considering a complaint, made against an accused, the Court assumes the contents of the complaint to be true and correct and then proceed to decide as to whether the allegations, made in the complaint, make out a case of commission of offence by the accused or not. No exercise is required to be undertaken by the Court to determine the truthfulness or veracity of the accusations. However, when the word, "prima facie", is coupled with the word, "true", it implies that the Court has to undertake an exercise of crosschecking the truthfulness of the allegations, made in the complaint, on the basis of the materials on record. If the Court finds, on such analysis, that the accusations made are inherently improbable or wholly unbelievable, it may be difficult to say that a case, which is prima facie true, has been made out.

176. The term "true" would mean a proposition that the accusation brought against the accused person, on the face of the materials collected during investigation, is not false. The term false again would mean a proposition, the existence of which cannot be a reality. While arriving at a finding whether there are reasonable grounds for believing that the accusation against the accused is prima facie true or false, the Court can only look into the materials collected during investigation, and on its bare perusal should come to a finding that the

accusation is inherently improbable, however, while so arriving at a finding the Court does not have the liberty to come to a conclusion which may virtually amount to an acquittal of the accused.

177. In the case of State of Gujrat vs. Gadhvi Rambhai Nathabai, reported in (1994) 5 SCC 3, the Supreme Court while dealing with the principles governing the granting of bail under the TADA, observed:--

"8. It is true that for the purpose of grant of bail, the framers of the Act require the Designated Court to be satisfied that there were reasonable grounds for believing that the accused concerned was not guilty of such offence but this power cannot be exercised for grant of bail in a manner which amounts virtually to an order of acquittal, giving benefit of doubt to the accused person after weighing the evidence collected during the investigation or produced before the Court. At that stage the Designated Court is expected to apply its mind as to whether accepting the allegations made on behalf of the prosecution on their face, there are reasonable grounds for believing that the accused concerned was not guilty of the offence. At that stage the Designated Court is not required to weigh the material collected during the investigation."

178. In short, thus, on a bare reading of the materials, as may have been collected during investigation, if the Special Court finds that the materials, so collected, are sufficient to form, when assumed to be true, an opinion that there are reasonable grounds to believe that the accusations, made against the accused, are prima facie true, the Special Court will be disempowered from releasing the accused on bail. At the stage of bail, no minute scrutiny or microscopic dissection of the materials, collected during investigation, shall be undertaken by the Special Court. Credibility or otherwise of the materials collected would not be the subject-matter of scrutiny. What, at best, the Special Court can do, and shall do, is to examine if the accusations made, on the basis of the materials collected, are highly improbable. When the materials are, on examination by the Special Court, are found to be not wholly improbable and the Special Court finds, on assuming such materials to be true, that the accusations, made against an accused, as regards commission of an offence under Chapter IV and/or Chapter'' VI of the UAP Act, are prima facie true, such materials would be enough to attract the bar imposed by the proviso to Section 43-D(5).

179. To put it a little differently, the Special Court is required to examine the materials, collected during investigation, assuming the same to be true and if, such materials, on such examination and consideration, are found to make out a case against the accused, the Special Court has to determine if there is any such thing in the materials, so collected, which would make the case, which has been made out against the accused, as a wholly improbable case. If the Special Court, on undertaking such an exercise, finds reasonable grounds to infer that the case, which has been made out against the accused, is not wholly improbable, the case would be treated as a case, which is sufficient for the Special Court to form an opinion that there are reasonable grounds to believe that the accusations, made

against the accused, are prima facie true.

180. The expression, "reasonable ground", means something more than prima facie ground, which contemplates a substantially probable case for believing that the accused is guilty of the offence(s) alleged. Under Section 437 Code of Criminal Procedure, an accused is not to be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence, which is punishable with death or imprisonment for life. Under Section 437 Code of Criminal Procedure, the burden is on the prosecution to show existence of reasonable ground for believing that the accused is guilty. Hence, the presumption of innocence, which always runs in favour of the accused, is displaced only on the prosecution showing existence of reasonable ground to believe that the accused is guilty. [See Union of India (UOI) Vs. Thamisharasi and Others, , and Union of India (UOI) Vs. Shri Shiv Shanker Kesari, .

181. Coupled with the above, the proviso to Section 43-D(5) does not require a positive satisfaction by the Court that the case against the accused is true. What is required is a mere formation of opinion by the Court on the basis of the materials placed before it. The formation of opinion cannot be irrational or arbitrary. Such formation of opinion cannot be based on surmises and conjectures; but must rest on the materials collected against the accused. Since the presumption of innocence runs in favour of the accused, it logically follows that if there are, in given circumstances, grounds for believing that the case, against the accused, is true, a case of commission of offence under Chapter IV or Chapter VI of the UAP Act, can be said to have been made out and when such a case is made out, it would be tantamount to saying that reasonable grounds exist for opining that the accusations are prima facie true. In such a case, the bar, imposed by the proviso to Section 43-D(5) on the Court''s power to grant bail, gets attracted.

182. We may point out that Section 20(8) of the TADA (since repealed), laid down that no person, accused of an offence punishable under the said Act, or any rule made thereunder, shall, if in custody, be released on bail, or on his own bond, unless, amongst others, the Court is satisfied, where the Public Prosecutor opposes the application, that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence, while on bail. Section 20(9) of the TADA made it clear that the limitation on granting of bail, specified in sub-section (8) of Section 20 of the TADA, is in addition to the restrictions, which the Code of Criminal Procedure, or any other law, in force, imposes.

183. There are no corresponding provisions, in the NIA Act as were present in Section 20(8) and Section 20(9) of the TADA Act: Notwithstanding, however, the fact that the provisions (as contained in sub-section (8) and/or sub-section (9) of Section 20 of the TADA Act) no longer find place in the N.I.A. Act, the fact remains that even under the scheme of the NIA Act, the Special Court, as already discussed above, is a "Court other than the High Court and Court of

Session".

184. In the circumstances indicated above, the limitations, imposed by Clauses (i) and (ii) of sub-section (1) of Section 437 of the Code of Criminal Procedure, are applicable to the Special Court too. In addition thereto, when a case falls within the ambit of the proviso to Section 43-D(5), there would be an additional bar, on the part of the Special Court, to release an accused on bail, the bar being that the Special Court shall not release the accused on bail or on his own bond if the Court, on perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure, is of the opinion that there are "reasonable grounds'' for believing that the accusation against such person is prima facie true.

185. Thus, while the Special Court, constituted under the N.I.A. Act, does not suffer from the limitations, which the TADA Courts had by virtue of the provisions of Section 20(8) of the TADA, read with Section 20(9) of the TADA, the fact remains that the Special Court, not being a Court of Session or of the High Court, cannot exercise the powers of the Court of Session or High Court under Section 439 of the Code of Criminal Procedure.

186. Hence, while dealing with the scheduled offences, covered by the proviso to sub-section (5) of Section 43-D, Special Court, constituted under the NIA. Act, would suffer not only from the limitations imposed by Clauses (i) and (ii) of sub-section (1) of Section 437 of the Code of Criminal Procedure, but also by the proviso to sub-section (5) of Section 43-D of the UAP Act, wherever the provisions, contained in the proviso to Section 43-D(5) of the UAP Act, would be applicable.

187. What crystallizes from the above discussion is that when a case is registered and investigated, under the NIA Act, for commission of scheduled offences, the Special Court would be competent to deal with not only the scheduled offences, but also other offences under any law for the time being in force. Such a law would obviously include offences under the Indian Penal Code.

188. We have also settled that the powers of the Special Court, constituted under the NIA Act, to grant bail is covered by, and shall remain confined within, the ambit of Section 437 of the Code of Criminal Procedure and, as an appellate Court, the High Court''s power, under Section 24(1) of the NIA Act, would be co-extensive with the powers of the Special Court. We have further settled that the ban, imposed on the power of the Court to release an accused, if a case falls within the proviso to Section 43-D(5) of the UAP Act, is in addition to the limitations imposed on the powers of Special Court (same as Magisterial Courts) by Clauses (i) and (ii) of Section 437(1) of the Code of Criminal Procedure.

SCOPE OF SECTION 167(2) VIS-A-VIS SECTION 309(2) OF THE CODE OF CRIMINAL PROCEDURE

189. We, now, come to the question as to whether remand of an accused post cognizance is permissible in order to await sanctioning authority''s decision on

the question of granting sanction for prosecution of an accused for the offence, which the accused is alleged to have committed, and whose cognizance would require sanction.

190. If cognizance is not taken of any offence on submission of charge-sheet, would it denude the Court of its powers, under Section 167(2) of the Code of Criminal Procedure, to remand the accused to custody, against whom charge-sheet is submitted, more particularly, in a case, where charge-sheet has been submitted, before the statutory period for submission of charge-sheet, as envisaged by sub-clauses (i) and (ii) of clause (a) of subsection (2) of Section 167 of the Code of Criminal Procedure, expires or elapses.

191. The contention of Mr. Praveen Kumar, learned Counsel, that once a charge-sheet is submitted on completion of investigation, Court cannot, without taking cognizance, remand an accused to judicial custody, needs to be examined, particularly, because further contention of Mr. Praveen Kumar is that on submission of charge-sheet, a Court can remand an accused under Section 309(2) of the Code of Criminal Procedure only inasmuch as Section 309(2) of the Code of Criminal Procedure mandates, according to Mr. Praveen Kumar, that it is only after taking cognizance of the offences triable by a Court that the Court acquires the power to remand an accused to custody.

192. In other words, what Mr. Praveen Kumar, learned Counsel, contends is that on submission of charge-sheet, a Court stands denuded of its power to remand an accused to custody by virtue of its power under Section 167(2) of the Code of Criminal Procedure and the only provision of law, which empowers a Court to remand to judicial custody an accused, upon submission of charge-sheet, is Section 309(2) of the Code of Criminal Procedure provided that the Court has, on the basis of charge-sheet, taken cognizance of offence or offences under Section 190(1)(b) of the Code of Criminal Procedure.

193. In order to test the above contention of Mr. Praveen Kumar, let us assume, for a moment, that an accused has been remanded, on 1st January, 2014, to judicial custody with direction to detain him until 14th January, 2014; but the charge-sheet against the accused is submitted on 12th January, 2014. No sooner the charge sheet is filed, the custodial detention of the accused cannot be said to have become illegal unless the Magistrate, on 12th January, 2014, itself, takes cognizance of the offence or offences disclosed by the charge-sheet and extends further remand of the accused.

194. Yet another example can be that the charge-sheet is submitted on 14th January, 2014, and because of voluminous charge-sheet, the Court may require time to decide if it shall or shall not take cognizance of the offence(s) alleged to have been committed by the accused. Yet, if Mr. Praveen Kumar''s contention is correct, the Court would per force be made to either take cognizance of some offence or release the accused, because it has not taken cognizance of any offence, though the Court could not apply its mind completely to the facts

uncovered by investigation, because of paucity of time.

195. The net result of what Mr. Praveen Kumar contends would be that the Court would be required to either take cognizance or release the accused without having been able to make up its mind if the materials, collected during investigation, do make out a case calling, or not calling, for taking of cognizance. This proposition would frustrate the scheme of the Code of Criminal Procedure, which aims at maintaining continuity in matters of remand, be the remand during the stage of investigation or on submission of charge-sheet.

196. Necessarily, therefore, the submission of the charge-sheet will not take away the power of the Court to remand an accused under Section 167(2) of the Code of Criminal Procedure. Far from this, the Court, notwithstanding filing of the charge-sheet, would still be competent to remand the accused by taking recourse to Section 167(2) of the Code of Criminal Procedure until such time, when it decides on the question of taking of cognizance and if it does take cognizance, then, further remand of the accused, if ordered, would be under Section 309(2) of the Code of Criminal Procedure so that continuity be maintained. If, however, the Court finds that no case for taking of cognizance has been made out, it may, having given notice to the informant and the victim, if any, close the proceedings.

197. If cognizance is not taken of any offence on submission of charge-sheet, would it denude the Court of its powers, under Section 167(2) of the Code of Criminal Procedure, to remand the accused to custody, against whom charge-sheet is submitted, more particularly, in a case, where charge-sheet has been submitted, before the statutory period for submission of charge-sheet, as envisaged by sub-clauses (i) and (ii) of clause (a) of sub-section (2) of Section 167 of the Code of Criminal Procedure, expires or elapses.

198. For the purpose of giving the Court the power to remand an accused by taking resort to Section 167(2) of the Code of Criminal Procedure pending decision by the Sanctioning Authority on the question as to whether sanction shall or shall not be granted or for the purpose of going through the relevant case diary, which may be a voluminous one, running into thousands of pages, the Court must be treated to have the implied power to remand an accused to custody under Section 167 of the Code of Criminal Procedure even after filing of the charge-sheet.

199. We must bear in mind that every Court must be deemed to possess, by necessary intendment, all such powers as are necessary to make its orders effective, this principle being embodied in the maxim ubi aliquid conceditur, concfeditur et id sine quo res ipsa esse non potest (where anything is conceded, there is conceded also anything without which the thing itself cannot exist). Vide Earl Jowitt''s Dictionary of English Law, 1959 Ed. 1797.

200. Thus, whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorized in express terms be also done, then, that something else will be supplied by necessary intendment.

201. In the case of Savitri Rawat Vs. Govind Singh Rawat, , the question confronting the Supreme Court was whether a Magistrate, before whom an application is made under Section 125 of the Code of Criminal Procedure, can make an interim order directing the person, against whom the application is made, to pay reasonable maintenance to the applicant concerned pending disposal of the application.

202. While answering the query, so posed, the Supreme Court held, in Savitri (supra) that in the absence of any express prohibition, it is appropriate to construe the provisions, in Chapter IX, as conferring an implied power, on the Magistrate, to direct the person, against whom an application is made under Section 125 of the Code of Criminal Procedure to pay some reasonable sum, by way of interim maintenance, to the applicant pending final disposal of the application.

203. The Supreme Court pointed out, in Savitri (supra) that it is quite common that applications, made under Section 125 of the Code of Criminal Procedure, take several months for disposal. In order, therefore, to enjoy the fruits of the proceedings under Section 125 of the Code of Criminal Procedure, the applicant should remain alive trill the date of the final order and this can be achieved only when an order for payment of interim maintenance is passed by court. The Supreme Court also pointed out, in Savitri (supra), that every court must be deemed to possess, by necessary intendment, all such powers as are necessary to make its orders effective, this principle being embodied in the maxim ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist.) Vide Earl Jowitt''s Dictionary of English Law 1959 Ed. 1797.

204. Thus, whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorized in express terms be also done, then, that something else will be supplied by necessary intendment. Such a construction of power would, in the light of the decision in Savitri (supra), advance the object of Section 125 of the Code of Criminal Procedure inasmuch as a contrary view is likely to result in grave hardship to the applicant, who may have no means to sustain herself until the final order is passed on the application made under Section 125 of the Code of Criminal Procedure.

205. Similarly, in the case of Sakiri Vasu Vs. State of U.P. and Others, , the Supreme Court, having placed reliance on the case of Savitri (supra), held that although Section 156(3) of the Code of Criminal Procedure is very briefly worded, there is an implied power vested in the Magistrate, under Section 156(3) of the Code of Criminal Procedure, to order registration of a criminal offence and/or to direct the Officer-in-Charge of the concerned police station to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in Section 156(3) of the Code of Criminal Procedure, we are of the opinion, observed the Supreme Court, in

Sakiri Vasu (supra), that they are implied in the provisions embodied in Section 156(3) of the Code of Criminal Procedure.

206. We may pause, at this stage, to point out that though the Supreme Court''s observation, in Sakiri Vasu (supra), to the effect that Section 156(3) of the Code of Criminal Procedure empowers the Magistrate to monitor investigation has not been agreed to in its subsequent decisions, the concept of the doctrine of implied power, succinctly described in Sakiri Vasu (supra), has not been deviated from. The relevant observations, made in Sakiri Vasu (supra), are, therefore, quoted below:--

"17. In our opinion Section 156(3) Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) Cr.P.C. though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

18. It is well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary for its execution.

19. The reason for the rule (doctrine of implied power) is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his Statutory Construction (3rd Edn., p. 267): "... If these details could not be inserted by implication, the drafting of legislation would be an interminable process and the legislative intent would likely be defeated by a most insignificant omission".

20. In ascertaining a necessary implication, the court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein.

21. An express grant of statutory powers carries with it by necessary implication the authority to use all reasonable means to make such grant effective. Thus in ITO vs. M.K. Mohammad Kunhi this Court held that the Income Tax Appellate Tribunal has implied powers to grant stay, although no such power has been expressly granted to it by the Income Tax Act.

22. Similar examples where this Court has affirmed the doctrine of implied powers are Union of India vs. Paras Laminates (P) Ltd., RBI vs. Peerless General Finance and Investment Co. Ltd. (AIR at p. 656), CEO & Vice-Chairman, Gujarat

Maritime Board vs. Haji Daud Haji Harun Abu, J.K. Synthetics Ltd. vs. CCE, State of Karnataka vs. Vishwabharathi House Building Coop. Society (SCC at p. 432), etc.

23. In Savitri vs. Govind Singh Rawat this Court held that the power conferred on the Magistrate under Section 125 Cr.P.C. to grant maintenance to the wife implies the power to grant interim maintenance during the pendency of the proceeding, otherwise she may starve during this period,." (Emphasis is supplied)

207. In the Income Tax Officer Vs. M.K. Mohammed Kunhi, , which has been referred to, in Sakiri Vasu (supra), the question, raised in the Supreme Court, was whether the Appellate Income Tax Tribunal has the power, under the relevant provisions of the Income Tax Act, 1961, to stay, during pendency of appeal, the recovery of the realization of the penalty imposed by the departmental authorities on an assessee.

208. While answering the question, posed above, the Supreme Court, in M.K. Md. Kunhi (supra), invoked the principle of implied power and held that it is a firmly established rule that an express grant of statutory power carries with it, by necessary implication, the authority to use all reasonable means to make such grant effective (Sutherland Statutory Construction, Third Edition, Articles 5401 and 5402).

209. The Supreme Court, in M.K. Md. Kunhi (supra), quoted, with approval, the observations made in Domat''s Civil Law Cushing''s Edition, Vol.-I at page 88, which read as under:--

"It is the duty of the Judges to apply the laws, not only to that appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made, and which appear to be comprehended either within the consequences that may be gathered from it. It is, therefore, seen that in order to meet certain rare circumstances, Court have adopted the doctrine of implied power, of course, with abundant caution bearing in mind that no prejudice or hardship is caused to adverse party."

210. What follows from the above discussion, with regard to the doctrine of implied power, is that when Section 309(2) of the Code of Criminal Procedure comes into play only when cognizance is taken by a Court so as to enable it to remand the accused to custody for further proceeding. The Court cannot be considered denuded of its power to remand the accused to custody by taking recourse to Section 167(2) of the Code of Criminal Procedure pending its decision on the question as to whether cognizance shall or shall not be taken.

211. It needs to be kept in view that the scope of Section 167(2) is widely different from the scope of Section 309(2) of the Code of Criminal Procedure. Section 167(2) of the Code of Criminal Procedure is available to a Court to remand an accused until the time the Court either takes cognizance or declines to take cognizance of any offence and it is only when the Court takes cognizance

that further remand, if made, has to be pursuant to the Court''s power under Section 309(2) of the Code of Criminal Procedure.

212. The case of Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra and Another, , is a clear pointer to the conclusion we have reached above inasmuch as facts of the case of Suresh Kumar Bhikamchand Jain (supra) were, to some extent and in certain aspects, same as in the present case, because in the case of Suresh Kumar Bhikamchand Jain (supra), despite the fact that a charge-sheet had been submitted, the Magistrate did not take cognizance and yet remanded the accused to custody. The argument, advanced, on behalf of the petitioner, Suresh Kumar Bhikamchand Jain (supra), was that upon submission of charge-sheet, the Magistrate could not have remanded the accused to custody without taking cognizance and because sanction was being awaited by the Magistrate, the accused was entitled, as of right, to be released on bail.

213. The question, therefore, arose if the remand of the accused, on submission of charge-sheet without taking cognizance, is sustainable in law. This factual background becomes evident from the observations made, at paragraph 16, in Suresh Kumar Bhikamchand Jain (supra), which read as follows:--

"...............it would be evident that both the charge-sheet as also the supplementary charge-sheet were filed within 90 days from the date of the petitioner''s arrest and remand to police custody. It is true that cognizance was not taken by Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the provisions of the PC Act, but does such failure amount to noncompliance with the provisions of Section 167(2) Cr.P.C. is the question with which we are confronted".

(Emphasis is added)

214. In other words, the Magistrate''s power to remand an accused under Section 167(2) of the Code of Criminal Procedure without taking cognizance was the question in controversy in Suresh Kumar Bhikamchand Jain (supra). This position becomes transparent on reading the observations made, at paragraph 2 also, in Suresh Kumar Bhikamchand Jain (supra), which run as follows:--

"One of such issues concerns the power of the Magistrate to pass orders of remand even beyond the period envisaged under Section 167(2) of the Code of Criminal Procedure. In the instant case, despite charge-sheet having been filed, no cognizance has been taken on the basis thereof. The learned Magistrate has, however, continued to pass remand orders, without apparently having proceeded to the stage contemplated under Section 309 of the Code of Criminal Procedure."

(Emphasis is added)

215. Considering the fact that charge-sheet had been filed, in Suresh Kumar Bhikamchand Jain (supra), within the time stipulated by Section 167(2) of the Code of Criminal Procedure, but sanction to prosecute the accused having not been obtained, no cognizance had been taken, the question, which, therefore,

arose, if we may repeat, was whether the Magistrate, without taking cognizance, could have remanded the accused or, rather, continued to have remanded the accused by taking recourse to Section 167(2) of the Code of Criminal Procedure. That this was the legal issue is apparent from the observations made, at paragraph 4, in Suresh Kumar Bhikamchand Jain (supra), which read as follows:--

"What has been stressed upon on behalf of the petitioner is that, although, charge-sheet had been filed within the time stipulated under Section 167(2) of the Code of Criminal Procedure, sanction to prosecute the petitioner had not been obtained, as a result whereof, no cognizance was taken of the offence. Notwithstanding the above, remand orders continued to be made and the petitioner remained in magisterial custody".

(Emphasis is supplied)

216. It was contended, on behalf of the petitioner, in Suresh Kumar Bhikamchand Jain (supra), that since the statutory period of 90 days, envisaged by Section 167(2) of the Code of Criminal Procedure, had elapsed, though the charge-sheet had been submitted before the statutory period of 90 days had elapsed, the petitioner could not have been remanded to custody by the Magistrate, who is yet to take cognizance, but cannot take cognizance for want of sanction.

217. The further submission, made on behalf of the petitioner, in Suresh Kumar Bhikamchand Jain (supra), was that as far as Section 309(2) of the Code of Criminal Procedure is concerned, the same would be applicable only after cognizance stand taken and since cognizance had not been taken, trial could not have been said to have commenced and the petitioner was, therefore, entitled to be released on bail, forthwith, on the basis of the indefeasible right acquired by the petitioner on the failure of the investigating authority to obtain sanction. That these were the submissions made, on behalf of the petitioner, in Suresh Kumar Bhikamchand Jain (supra), are clear from a reading of paragraph 7, which we reproduce below:--

"Mr. Lalit also submitted that Section 309 Cr.P.C., which also deals with remand of the accused under certain circumstances, does not apply to the allegations relating to the provisions of the PC Act, inasmuch as, there is no committal proceeding contemplated in the proceeding before the learned Special Judge. However, as far as Section 309 Cr.P.C. is concerned, Mr. Lalit submitted that the same would be applicable only after cognizance of the offence had been taken or upon the commencement of the trial before the Special Court. In the absence of cognizance being taken by the Special Court, it could not be said that the trial had commenced and, therefore, further detention of the petitioner was wholly illegal and not authorized in law and he was, therefore, entitled to be released on bail forthwith on the basis of the "indefeasible right" acquired by him on the failure of the investigating authorities to obtain sanction for prosecuting the petitioner."

(Emphasis is supplied)

218. The question, therefore, which fell for consideration, in Suresh Kumar Bhikamchand Jain (supra), was, in the words of Supreme Court, at paragraph 13, thus, "the right of a Magistrate or the trial court to pass orders of remand in terms of Section 167(2) of the Code of Criminal Procedure beyond the period prescribed therein".

219. Having taken note of the provisions embodied in Section 167 of the Code of Criminal Procedure, as a whole, vis-a-vis Section 309(2) of the Code of Criminal Procedure, the Supreme Court delineated the distinction between Section 167(2), on the one hand, and Section 309(2) of the Code of Criminal Procedure, on the other, in Suresh Kumar Bhikamchand Jain (supra), in the following words:--

"In our view, grant of sanction is nowhere contemplated under Section 167 of the Code of Criminal Procedure. What the said section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the legislature intended investigation of certain crimes to be completed within 60 days and offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the court has no option but to release the accused on bail. The said provision has been considered and interpreted in various cases, such as the ones referred to hereinbefore. Both the decisions in Natbar Parida case and in Sanjay Dutt case were instances where the charge-sheet was not filed within the period stipulated in Section 167(2) Cr.P.C. and an application having been made for grant of bail prior to the filing of the charge-sheet, this court held that the accused enjoyed an indefeasible right to grant of bail, if such an application was made before the filing of the charge-sheet, but once the charge-sheet was filed, such right came to an end and the accused would be entitled to pray for regular bail on merits.

None of the said cases detract from the position that once a charge-sheet is filed within the stipulated tune, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether the cognizance is taken is not material as far as Section 167 of the Code of Criminal Procedure is concerned. The right which may have accrued to the petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 Cr.P.C. The scheme in Cr.P.C. is such that once the investigation stage is completed, the court proceeds to the next stage, which is taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) Cr.P.C., the Magistrate is vested with authority to remand the accused to custody, both police custody and/or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 Cr.P.C. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court."

(Emphasis is supplied).

220. Finally, the Supreme Court, in Suresh Kumar Bhikamchand Jain (supra), observed and held as under:--

"Having regard to the above, we have no hesitation in holding that notwithstanding the fact that the prosecution had not been able to obtain sanction to prosecute the accused, the accused was not entitled to grant of statutory bail since the charge-sheet had been filed well within the period contemplated under Section 167(2)(a)(ii) Cr.P.C. Sanction is an enabling provision to prosecute, which is totally separate from the concept of investigation which is concluded by the filing of the charge-sheet. The two are on separate footings. In that view of the matter, the special leave petition deserves to be and is hereby dismissed."

(Emphasis is added)

221. From what have been observed and laid down in Suresh Kumar Bhikamchand Jain (supra), it becomes more than abundantly clear that on submission of charge-sheet, and while awaiting grant of sanction under the Prevention of Corruption Act, 1988, the Magistrate is empowered to remand an accused to custody by virtue of powers vested in him under Section 167(2) of the Code of Criminal Procedure and it is only when he takes cognizance, the stage of Section 309(2) of the Code of Criminal Procedure is reached and till then, the remand of the accused can be legally continued by taking resort to the provisions embodied in Section 167(2) of the Code of Criminal Procedure.

222. Thus, while awaiting the grant of sanction, on submission of charge-sheet, Court is not denuded of its power to remand an accused to custody by virtue of

his power under Section 167(2) of the Code of Criminal Procedure. However, once cognizance is taken, the remand, if any, would be pursuant to Court''s power, under Section 309(2) of the Code of Criminal Procedure.

WHETHER A SPECIAL COURT. CONSTITUTED UNDER THE NIA ACT. CAN TAKE COGNIZANCE OF ANY OFFENCE UNDER THE INDIAN PENAL CODE OR UNDER ANY SPECIAL LAW IF IT (SPECIAL COURT) DOES NOT TAKE COGNIZANCE OF ANY SCHEDULED OFFENCE UNDER THE NIA ACT:

223. Let us, now, turn to the contentious issue, raised, on behalf of the accused-petitioner, whether a Special Court, under the NIA Act, can take cognizance of any offence under the Indian Penal Code or under any special law other than scheduled offences under the NIA Act without having, first, taken cognizance of any of the scheduled offences under the NIA Act.

224. Countering the submission, made on behalf of the accused-petitioner, that no cognizance of any offence under the Indian Penal Code could have been taken, in the present case, by the Chief Judicial Magistrate, when the case involved, inter alia, alleged commission of schedule offences, learned Additional Advocate General has submitted that there is no bar in taking of cognizance of offences under the Indian Penal Code or under any special law other than scheduled offence under the NIA Act without taking, first, cognizance of scheduled offence under the NIA Act if a charge-sheet is submitted for alleged commission of scheduled offences under the NIA Act and other offences under the Indian Penal Code.

225. While considering the present writ petition and in order to appreciate the correctness of the rival submissions, which have been made before us, imperative, we deem, it is to take note of Section 14 of the NIA Act. We, therefore, reproduce hereinbelow the provisions of Section 14 of the NIA Act:--

"14. Powers of Special Courts with respect to other offences.--(1) When trying any offence, a Special Court may also try any other offence with which the accused may, under the Code be charged, at the same trial if the offence is connected with such other offence.

(2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or under any other law, the Special Court may convict such person or such other offence and pass any sentence or award punishment authorized by this Act or, as the case may be, under such other law."

226. From a reading of the provisions embodied in Section 14 of NIA Act, what clearly surfaces is that a Special Court, within the scheme of the NIA Act, is primarily appointed to try scheduled offences under the NIA Act.

227. The question, therefore, is: whether a Special Court can try an accused, who is alleged to have committed an offence under the Indian Penal Code if no scheduled offence is alleged to have been committed by such an accused under

the NIA Act or if no cognizance is taken of any scheduled offence under the NIA Act, by the Special Court for absence of requisite sanction.

228. The answer to the question, posed above, is not very far to seek. A careful reading of sub-section (1) of Section 14 of the NIA Act makes it clear that when trying any scheduled offence, a Special Court may also try any other offence with which the accused may, under the Code be charged, at the same trial, if the offence is connected with such other offence and sub-section (2) of Section 14 of the NIA Act makes it further clear that if, in the course of any trial under the NIA Act of any scheduled offence, it is found that the accused person has committed any other scheduled offence under the NIA Act or under any other law, the Special Court may convict such person of such other offence and pass any sentence or award punishment authorized by the NIA Act or, as the case may be, under such other law.

229. In other words, a Special Court is constituted, under the NIA Act, for the purpose of, primarily, trying scheduled offence under the NIA Act.

230. Unless, therefore, a Special Court has taken cognizance of scheduled offence under the NIA Act, it does not acquire jurisdiction to take cognizance of any offence under the Indian Penal Code.

231. A cautious and close reading of the provisions of Section 14 of NIA Act make it crystal clear that a Special Court can try an offence, other than a scheduled offence mentioned under the NIA Act, only when the Special Court is trying a case, under the NIA Act, meaning thereby that it is only when a Special Court is, otherwise, trying a case covered by the NIA Act that the Special Court acquires the jurisdiction and power to try such an accused for any other offence, which may be punishable under the Indian Penal Code or under any special law other than the NIA Act.

232. What logically follows from the above discussion is that if a Special Court is not trying a case under the NIA Act, it has no jurisdiction to try any offence either under the Indian Penal Code.

233. It further logically follows from the above discussion that cognizance of a scheduled offence, punishable under the NIA Act, has to be taken by a Special Court before it takes cognizance of any offence under the Indian Penal Code or under any special law other than the NIA Act.

234. To put it a little differently, taking of cognizance of a scheduled offence, under the NIA Act, is a condition precedent for a Special Court to acquire jurisdiction to try any other offence.

235. In short, therefore, taking of cognizance of a scheduled offence, under the NIA Act, must precede the taking of cognizance of any offence either under the Indian Penal Code or any special law other than scheduled offences as defined by the NIA Act.

236. We have already pointed out that a Special Court has the jurisdiction to take cognizance of an offence under the Indian Penal Code or under any special law, other than the NIA Act, provided it (Special Court) has already taken cognizance of any of the scheduled offence under the NIA Act. Logically extended, it would mean that without taking cognizance of a scheduled offence under the NIA Act, a Special Court''s act of taking cognizance of any of the offences, punishable under the Indian Penal Code, would be wholly without jurisdiction and void ab initio.

237. From the discussion held above, as a whole, what crystallizes and may be summarized as follows:--

I. SPECIAL LAW:

(a) If the ''special law'' imposes any limitation on the powers of the Court, which will try an offence, then, the ordinary criminal court, which may try such an offence, have to follow, and abide by, the limitations, which might have been imposed on its powers under the ''special law'', though the Code of Criminal Procedure may not have imposed such a limitation. Similarly, if the ''special law'' confers any power on such a Court, then, the Court, which exercises the powers of the Special Court, in the absence of constitution of the Special Court, would also enjoy such powers, as may be available to the Special Court even if such powers are, otherwise, not, ordinarily, available, in the Code of Criminal Procedure, to such a Court.

(b) Jurisdiction of the ordinary criminal courts, under Section 4 of the Code of Criminal Procedure, in respect of even offences under the ''special law'', is comprehensive. Consequently, so long as no other machinery is set up for trial of any particular case or class of cases under the ''special law'', jurisdiction of the ordinary criminal courts would be available depending, of course, on the period of punishment prescribed in respect of the offence(s) concerned except to the extent as the ''special law'' may, as regards the manner of dealing with such a case, otherwise, prescribes.

(c) Exclusion of jurisdiction of a Court of an ordinary criminal jurisdiction can be brought about only by making provisions for setting up of a Court of limited jurisdiction. Hence, where no Special Court is contemplated under a ''special law'', it is the ordinary criminal court, which will exercise jurisdiction in respect of the offence against "other" laws (i.e., ''special law). The exercise of such jurisdiction would, of course, stand modified to the extent as the ''special law'' may indicate.

(d) If, however, a Special Court is contemplated, but not constituted and the special enactment envisages that during he transitory period, the ordinary criminal court, which may have, otherwise, jurisdiction in respect of an offence (depending upon the punishment prescribed), would exercise the jurisdiction. However, the exercise of jurisdiction by the ordinary criminal court would, in such a case, be controlled by such limitations as the special enactment may envisage in respect of the Special Court. In short, the law and procedure, for trial of cases under the Indian Penal Code and those, under special statutes, cannot differ except to the extent as the "other" law, (i.e., special or local law) may prescribe.

(e) Consequently, if a ''special law'' provides for trial of a class of offences by Court of Session and make such Court of Session a Court of original jurisdiction empowering it to take cognizance of an offence on the basis of a "complaint" as defined in Section 2(d) of the Code of Criminal Procedure and/or on the basis of "police report" as contemplated under the provisions of Section 173(2) of the Code of Criminal Procedure, the Court of Session will be empowered as well as bound to take cognizance of such offence without the case being committed of it as is, ordinarily, done by a Judicial Magistrate.

(f) In short, and if we may reiterate, even the Court of Session will try an offence, under any "other" law or "special" law, subject to such limitations as may be imposed on the power of the Court of Session or subject to such modification, in the procedure, as the "other" law, i.e. ''special law'', may provide in respect of such an offence.

II. INVESTIGATING AGENCY UNDER THE NIA ACT:

(a) The NIA Act has created the National Investigation Agency, as an agency, which is to be constituted by the Central Government, in exercise of its power under Section 3 of the NIA Act, in order to investigate scheduled offences, which, in terms of Section 2(g) of the NIA Act, mean the offences specified in the Schedule to the NIA Act.

(b) Sub-section (3) of Section 3 of the NIA Act clearly shows that an officer of the Agency shall have the powers of an officer-in-charge of a police station, while discharging the functions of such an officer within the limits of his station.

(c) On receipt of information and, having recorded the information, in terms of Section 154 of the Code of Criminal Procedure, relating to any scheduled offence, the officer-in-charge of the police station, shall, under Section 6(1) of the NIA Act, forward a report to the State Government forthwith. The report, so received by the State Government, has to be forwarded, under Section 6(2); of the NIA Act, by the State Government to the Central Government as expeditiously as possible.

(d) In terms, of sub-section (3), read with sub-section (4) of Section 6 of the NIA Act, if the Central Government, on receipt of the report, finds it a fit case to be investigated by the Agency, it shall direct he Agency to investigate the offence. Apart from the fact that the Central Government can direct the Agency, on the basis of a report received from the State Government, to investigate a case, such a direction can also be issued, in the light of Section 6(5) of the NIA Act, by the Central Government suo motu.

(e) Section 8 of the NIA Act makes it clear that while investigating any scheduled offence, the Agency may also investigate any other offence, which the accused is alleged to have committed, if the offence is connected with the scheduled offence.

(f) Section 10 of the NIA Act makes it clear that unless the National Investigating Agency, which is being referred to as the Agency, undertakes an investigation into a scheduled offence under the NIA Act, the investigating agency of the State Government shall have the power to investigate scheduled offence and prosecute the offender.

(g) Thus, both, the Agency of the Central Government as well as the investigating agency of the State Government, are competent to investigate a scheduled offence, the difference between the powers of the two investigating agencies being that when the National Investigation Agency investigates a scheduled offence, the investigating agency of a State Government cannot investigate the said scheduled offence. However, the Agency, constituted by the Central Government, is empowered to associate investigating agency of a State Government in the investigation of a scheduled offence.

III. SPECIAL COURT:

(a) Section 11 of the NIA Act empowers the Central Government to constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification.

(b) Even the State Government, as indicated above, has been empowered, under Section 22 of the NIA Act, to constitute Special Court(s) for the trial of offences under any or all the enactments specified in the Schedule of the NIA Act.

(c) If a scheduled offence, as specified under the NIA Act, is investigated by the Agency, it is the Special Court, constituted by the Central Government, under Section 11 of the NIA Act, which would alone have the power to try the accused, who is alleged to have committed a scheduled offence, inasmuch as Section 13 of the NIA Act makes it clear that notwithstanding anything contained in the Code of Criminal Procedure, every scheduled offence, investigated by the Agency, shall be tried only by the Special Court within whose local jurisdiction the offence was committed and, on the other hand, if the commission of the scheduled offence is investigated by an officer of the State Police, and not by the Agency, it is the Special Court, constituted, under Section 22 of the NIA Act, by the State Government, which would have the power to hold trial in respect of scheduled offences under the NIA Act.

(d) When Section 11 and Section 13 of the NIA Act are read, in the light of Section 22(3) of the NIA Act, it also becomes clear that so long as a Special Court is not constituted by the Central Government and scheduled offence is investigated by the ''Agency'', it is the Court of Session of the Division, where the scheduled offence is committed, which will be the competent Court to deal with the case during the period of investigation by the Agency of the scheduled offence and also to try the accused for commission of scheduled offence, when the investigation ''is completed.

(e) However, when a scheduled offence is investigated by the investigating agency of a State Government, it is the Special Court, constituted under Section 22 of the NIA Act, by the State Government, which will be the competent Court to deal with such a case during the period of investigating (sic--investigation?) by the State Police and also thereafter, when investigation is complete, and when no Special Court is constituted by the State Government under Section 22 of the NIA Act, then, it is the Court of Session of the Division, where such scheduled offence is committed, which will be the competent Court for the purposes aforesaid.

(f) When NIA Act has come into force and a Special Court has been constituted, in the State of Bihar, by the Central Government in exercise of its power under Section 11 of the NIA Act, a person, involved in the commission of a scheduled offence under the NIA Act, would be liable to be dealt with in the manner as is required to be dealt with by the Special Court, constituted by the Central Government in terms of Section 11 of the NIA Act, provided that the case, against such a person, has been investigated by the National Investigating Agency.

(g) What logically follows from the above is that when the NIA Act has come into force and no Special Court has yet been constituted, as envisaged by the NIA Act, in the State of Bihar, by the Government of Bihar, an offender, in the light of Attiqur Rehman''s case (supra) read with Section 22(3) of the NIA Act, cannot go unpunished and his case has to be dealt with by the Court of Session of the Division, where the scheduled offence is alleged to have been committed. The Court of Session, in such a case, has to deal with the case in the same manner as may have been dealt with by a Special Court, had a Special Court been constituted by the State Government under Section 22 of the NIA Act.

(h) Special Court does not become a Court of Session inasmuch as it is only the power of trial of a Court of Session that the Special Court is, by virtue of Section 16(3) of the NIA Act, entitled to exercise. In other words, the expression, ''as if it were a Court of Session'', which occurs in Section 16(3) of the NIA Act, really reflects that'' it is only the procedure for trial of a Sessions Case, which a Special Court can follow; but it is, otherwise, not a Court of Session.

IV. In other words, when the NIA Act has come into force and no Special Court has yet been constituted by the State Government as envisaged by the NIA Act, an offender cannot go unpunished and his case has to be dealt with in the same manner as may have been dealt with by Special Court, had the Special Court been constituted. Such a case would be tried by the jurisdictional Court of Session in terms of Section 22 of the NIA Act.

V. It is the Special Court, under the NIA Act, or the Court of Session, when the Special Court has not been constituted, under Section 11 of the NIA Act, where an accused is required to be produced if he is arrested in connection with a scheduled offence, which is being investigated by the Agency. However, when a scheduled offence is being investigated by a police officer of a State Government and not by the Agency, the production of the accused will take place before the Special Court, which the State Government may have constituted under Section 22 of the NIA Act, and if no such Special Court has been constituted by the State Government, then, the production of the accused shall take place before the jurisdictional Court of Session.

VI. In either case, on production of the accused before the Special Court or the jurisdictional Court of Session, as the case may be, it is the Special Court or the Court of Session, as the case may be, which shall have the power to grant bail. The source of power of the Special Court or the Court of Session, as the case may be, to consider an application for bail is traceable to, and governed by, the provisions of Section 437 of the Code of Criminal Procedure and while considering such an application for bail, the Special Court or the Court of Session, as the case may be, will not exercise the power of bail as if it is considering an application for bail under Section 439 of the Code of Criminal Procedure and, consequently, the Special Court or the Court of Session, as the case may be, would have all the limitations, which a Magistrate has, while deciding an application for bail, under Section 437 of the Code of Criminal Procedure.

VII. Even a High Court cannot invoke its powers under Section 439 of the Code of Criminal Procedure, to grant bail if it has been refused by the Special Court or the Court of Session, as the case may be, nor can the High Court, in exercise of its power, under Section 439 of the Code of Criminal Procedure, cancel bail if bail has been granted to such an accused by the Special Court or the Court of Session, as the case may be. If the bail has been refused or granted by the Special Court or the Court of Session, as the case may be, the aggrieved party may, however, prefer an appeal, in terms of Section 21 of the NIA Act, to the High Court. Such an appeal has to be heard by a Division Bench of the High Court and in such an appeal, the merit of the order, granting or refusing bail can be questioned. [See, Usmanbhai Dawoodbhai Memon (supra) and Mid. Hussain @ Saleem (supra) See also Redaul Hussain Khan and Others Vs. State of Assam and Others, , and Jayanta Kumar Ghosh and Another Vs. State of Assam and Others, .

VIII. When a case is registered and investigated, under the N.I.A. Act, for commission of scheduled offences, the Special Court would be competent to deal with not only the scheduled offences, but also other offences under any law for the time being in force. Such a law would obviously include offences under the Indian Penal Code.

IX. Consequently, the production of an accused in such a case, as mentioned above, shall take place before a Special Court and, in the absence of the Special Court, in the jurisdictional Court of Session, which shall be competent to either remand the accused from time to time or release him on bail.

X. A Special Court or a jurisdictional Court of Session would be also competent to take cognizance of an offence under any law for the time being in force. Such a law would include offences under the Indian Penal Code. The trial would, however, take place by following the procedure prescribed for trial of Sessions Cases.

XI. Logically extended, it would mean that the Court of the Chief Judicial Magistrate is not the competent Court for production of an accused, who is alleged to have been involved in the commission of a scheduled offence, nor is a Court of Chief Judicial Magistrate the competent Court to order remand of such an accused. Consequently, such a Court cannot take cognizance of an offence under the Indian Penal Code if the case involves commission of a scheduled offence, too, and, in such a case, if the accused is produced before a Chief Judicial Magistrate or any other Magistrate, he would be bound to forward the case, along with the arrested accused, to the Special Court, if Special Court stands constituted, or to the jurisdictional Court of Session, if the Special Court has not been constituted.

XII. The embargo, imposed on the power of a Court to release an accused, when the case falls within the proviso to Section 43-D(5) of the UAP Act, is in addition to the limitations imposed on the powers of Special Court (same as Magisterial Courts) by'' Clauses (i) and (ii) of Section 437(1).

XIII. While awaiting the grant of sanction, on submission of charge-sheet, Court is not denuded of its power to remand an accused to custody by virtue of its power under Section 167(2) of the Code of Criminal Procedure until the time cognizance is taken. However, once cognizance is taken, the remand, if any, would be pursuant to the Court''s power under Section 309(2) of the Code of Criminal Procedure.

238. Reverting to the case at hand, it may be pointed out that no Special Court has been constituted by the Government of Bihar in exercise of its powers under Section 22 of the NIA Act and, hence, the power of the Special Court, as envisaged under the NIA Act, has to be exercised by the Sessions Judge of the Division, where the scheduled offence has been committed.

239. In the case at hand, there is no material to show that any specific report, in terms of the requirement of Section 6(i) of the NIA Act, was forwarded by the Officer-in-Charge, Lakhisarai Police Station, to the State Government nor is there any material on record to show that the State Government, in turn, forwarded the report, received by the Officer-in-Charge of the Lakhisarai Police Station, as required by Section 6(2) of the NIA Act, to the Central Government.

240. Nonetheless, as the State Police is empowered to investigate a scheduled offence and since it is permissible for a Special Court, constituted by the State Government, or, in the absence of such a Special Court, by the Sessions Judge of the Division, where the scheduled offence has been committed under the NIA Act, to try an accused involved in the commission of a scheduled offence under

the NIA Act, which is investigated by the State Police, it is the Sessions Judge of Lakhisarai Sessions Division, who has to exercise the power of the Special Court under the NIA Act.

241. The powers of the Sessions Judge, at Lakhisarai, would include the power to remand the accused-petitioner, in the present case (who is, alleged to be involved in the commission of the scheduled offence) to custody or allow him to go on bail or decline to allow him to go on bail, depending upon the materials collected during investigation, take cognizance, if required, of the scheduled offence(s), under the NIA Act, on the basis of the police report, in the manner as has been indicated in the NIA Act and if the Sessions Judge takes cognizance of a scheduled offence, he shall be competent to try other offences created by the Indian Penal Code.

242. Conversely, if the Sessions Judge, at Lakhisarai, does not take cognizance of a scheduled offence, under the NIA Act, or is debarred from taking cognizance of a scheduled offence, because of the lack of sanction, as is contemplated by the UAP Act, the Sessions Judge would not be the competent to take cognizance of any of the offences of the Indian Penal Code inasmuch as the power to take cognizance of, and try, an offence under the Indian Penal Code, has to be preceded by Special Judge''s act of taking cognizance of a scheduled offence under the NIA Act.

243. What logically follows from the above discussion is that a Chief Judicial Magistrate, and any Magistrate, subordinate to him, cannot take cognizance of an offence under the Indian Penal Code if the case or the charge-sheet, as in the present case, involves commission of a scheduled offence under the NIA Act.

244. In the present case, the proper course of action would have been for the learned Chief Judicial Magistrate, Lakhisarai, to forward the case to the learned Sessions Judge, Lakhisarai, so that the latter could have exercised jurisdiction in accordance with law, as indicated above, with regard to taking of cognizance, remand of the accused and otherwise.

245. Merely because of the fact that the learned Chief Judicial Magistrate, Lakhisarai, has taken cognizance of the offence under the Indian Penal Code and has been remanding the accused from time to time and some orders have also been passed by the learned Additional Chief Judicial Magistrate, Lakhisarai, remanding the accused to custody and though all these orders may be treated as non-est in law, being without jurisdiction, the fact of the matter remains that in the light of the decision in Attiqur Rehman''s case (supra), the accused persons, in the present case, including the present petitioner, against whom charge-sheet has already been filed, for alleged commission of scheduled offences under the NIA Act as well as other offences under the Indian Penal Code, cannot be allowed to go scot-free without being dealt with in accordance with law and, hence, they are warranted to be dealt with in the light of what we have discussed and pointed out above.

246. Because of what have been discussed and pointed out above, the impugned order, dated 22.5.2014, whereby cognizance has been taken of offences under the Indian Penal Code, is hereby set aside and, in consequence thereof, it is directed that the case shall be forwarded to the learned Sessions Judge, Lakhisarai inasmuch as it is the Court of Session at Lakhisarai Division which is the competent Court to deal with the matter in accordance with law bearing in mind the observations, which have been made above in the preceding paragraphs of this decision.

247. This writ petition shall accordingly stand disposed of. No order as to costs.

Anjana Mishra, J.

I agree.

